Petition

81-1807

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No.

IN THE

Supreme Court of the United States

October Term, 1981

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,

and

CONSOLIDATED RAIL CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT OF 1973

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QUESTIONS PRESENTED

I. Whether the Tenth Amendment to the United States Constitution permits the Federal Government to dictate to a state transportation authority the employees it must hire and the unions it must recognize as well as other employment conditions if the authority operates a high-speed passenger rail system.

II. Whether the Northeast Rail Service Act of 1981 prohibits a state transportation authority from operating high-speed, passenger rail service with its own employees pursuant to state labor laws, without becoming subject to the restrictive and inconsistent labor relations provisions of the Northeast Rail Service Act of 1981.

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v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,

and

CONSOLIDATED RAIL CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT OF 1973

Petitioner, Southeastern Pennsylvania Transportation Authority, respectfully asks that a writ of certiorari issue to review the Judgment of the Special Court, Regional Rail Reorganization Act of 1973, entered in this proceeding on March 9, 1982 and the Special Court's Opinion dated January 27, 1982.[1]

1. The only other party to this proceeding was the United States, which requested and was granted leave to participate as *amicus curiae* shortly after October 6, 1981, when the Clerk of the Special Court certified to the Attorney General of the United States that the constitutionality of Section 508 of the Rail Passenger Service Act was drawn into question in the case. The constitutionality of Sections 508 and 510 of the Rail Passenger Service Act is again challenged in this Petition.

OPINION BELOW

The Opinion and Judgment of the Special Court, Regional Rail Reorganization Act of 1973, are reported at Special Court Reporter D75-00016—D75-00063, and D75-00064—D75-00065, respectively. The Opinion and Judgment are appended hereto.

JURISDICTION

The Judgment of the Special Court, Regional Rail Reorganization Act of 1973, was entered on March 9, 1982 and filed on March 11, 1982. No petition for rehearing was filed. Petitioner invokes this Court's jurisdiction under Section 1152(b) of the Northeast Rail Service Act of 1981, Subtitle E of Title XI of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved in this case and are set forth verbatim in the appendix hereto.

1. United States Constitution, Amendment X.
2. Northeast Rail Service Act of 1981, Subtitle E of Title XI of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1136, 95 Stat. 357.
3. Northeast Rail Service Act of 1981, Subtitle E of Title XI of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1152, 95 Stat. 357.
4. Rail Passenger Service Act § 508, as added by the Northeast Rail Service Act of 1981, Subtitle E of Title XI of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1145, 95 Stat. 357.
5. Rail Passenger Service Act § 510, as added by the Northeast Rail Service Act of 1981, Subtitle E of Title XI of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1145, 95 Stat. 357.
6. Railway Labor Act, § 9A, as added by the Northeast Rail Service Act of 1981, Subtitle E of Title XI of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1157, 95 Stat. 357.

STATEMENT OF THE CASE

This case involves efforts by the Federal Government to dictate to a state transporatation authority the employees it must hire and the unions it must recognize as well as other employment conditions if the authority operates a high-speed passenger rail system. Such efforts are unconstitutional and unreasonable and threaten the future of passenger rail service in the Northeast.

The Southeastern Pennsylvania Transportation Authority (hereinafter "SEPTA")[2] provides transportation in the Philadelphia metropolitan area via bus, subway, elevated and trolley to approximately 244 million passengers annually, over approximately 2,000 miles of bus, trolley, subway and elevated rights-of-way. Prior to April 1, 1976, SEPTA also helped to assure the provision of passenger rail service on 13 lines radiating from center city Philadelphia by making subsidy payments to the Pennsylvania Railroad (later the Penn Central) and the Reading Company, and later to their trustees in bankruptcy. In making these payments, SEPTA continued a tradition of public

2. SEPTA is a corporation organized and existing under the provisions of the Pennsylvania Urban Mass Transportation Law, Act of July 10, 1980, P. L. 427, No. 101, 55 P. S. §§ 600.101, *et seq.*, which provides that SEPTA "shall exercise the public powers of the Commonwealth as an agency and instrumentality thereof." 55 P. S. § 600.303(a). The Act requires SEPTA to "maintain at all times a fast, reliable and economical transportation system suitable and adapted to the needs of the municipalities served by [it] and for safe, comfortable and convenient service." 55 P. S. § 600.303 (d)(30). The Act gives SEPTA broad powers to carry out this public function including the authority to "determine by itself, exclusively, the facilities to be operated by it, the services to be available and the rates to be charged therefor." 55 P. S. § 300.303 (d)(9). This Act is essentially a reenactment of SEPTA's prior governing statute, the Metropolitan Transportation Authorities Act of 1963, Act of August 14, 1963, P. L. 984, No. 450, 66 P. S. §§ 2001, *et seq.* (repealed).

involvement in the provision of rail service in the Philadelphia area dating back to the mid-1950's.

Since April 1, 1976, SEPTA has provided for the operation of passenger rail service by making subsidy payments to the Consolidated Rail Corporation (hereinafter "Conrail") pursuant to § 304 of the Regional Rail Reorganization Act of 1973, as amended, 45 U. S. C. § 744.[3] However, this arrangement must soon end. On August 13, 1981, the Northeast Rail Service Act of 1981 (hereinafter "NRSA"), Subtitle E of Title XI of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, became effective. Section 1136 of NRSA provides that:

> "Notwithstanding any other provision of law or contract, Conrail shall be relieved of any legal obligation to operate commuter service on January 1, 1983."

On July 1, 1980, before NRSA became effective, in the face of Conrail's rapidly escalating costs, SEPTA assumed direct responsibility for the operation of passenger rail service on the Newtown-Fox Chase line, a 15.2 mile stretch between Newtown and Fox Chase, Pennsylvania. This service previously had been provided by Conrail under contract with SEPTA. After making extensive repairs to tracks and stations on the line, SEPTA announced that it would commence high-speed rail service between Newtown and Fox Chase on October 5, 1981.[4] SEPTA

3. Section 304 required Conrail to continue service existing on April 1, 1976 if a transportation authority such as SEPTA offered to subsidize the service, but did not require any authority to make such an offer.

4. SEPTA is operating this service with its own employees, members of the same union, recognized in accordance with Pennsylvania law, that represents the majority of SEPTA's bus, subway

also announced that, subject to adequate funding, it intended to assume direct operating responsibility for all passenger rail service originating from Reading Terminal in Philadelphia by early 1982.[5]

On or about September 30, 1981, the Railway Labor Executives' Association (hereinafter "RLEA"), an unincorporated association of the chief executive officers of the majority of the labor organizations which represent Conrail employees engaged in providing rail service under Conrail's contract with SEPTA, filed a verified complaint with the Special Court, Regional Rail Reorganization Act of 1973, seeking declaratory relief and an injunction prohibiting SEPTA from taking over the operation of service presently operated by Conrail without first complying with Sections 508 and 510 of the Rail Passenger Service Act (hereinafter "RPSA"), as added by Section 1145 of NRSA.[6]

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4. (Cont'd.)

and trolley operators. SEPTA has achieved significant cost savings on the Newtown-Fox Chase line because its operation is freed of the archaic work rules and the burdensome provisions of contracts between Conrail and the representatives of Conrail's employees.

5. Direct operation of service by SEPTA employees, free from the restrictive labor provisions of NRSA, continues to be the method of operation that SEPTA would like to pursue.

6. Section 508 requires that Conrail, commuter authorities that intend to operate commuter service, and the representatives of the various crafts or classes of Conrail employees to be transferred to the commuter authorities negotiate an implementing agreement to determine the number, identity and seniority rights of employees to be transferred to the commuter authorities. In the event the parties cannot agree, Section 508 provides for binding arbitration.

Section 510 requires and establishes a detailed procedure for collective bargaining negotiations between the commuter authorities that intend to operate commuter service and the representatives of the various classes or crafts of employees to be transferred to such commuter authorities.

RLEA alleged that the Special Court had jurisdiction by reason of Section 1152(a) of NRSA.

Oral argument was held before the Special Court on October 2, 1981. During the argument, the Court and the parties agreed that the dispute raised constitutional and statutory questions which could not be decided on a motion for preliminary relief and which the Court was likely to face again in the near future in connection with SEPTA's plan to operate directly other passenger rail service. The Court denied RLEA's motion for temporary relief and ordered that a hearing on RLEA's motion for preliminary injunction be consolidated with a hearing on the merits of the action.

In an Opinion dated January 27, 1982, the Special Court held that SEPTA was not obligated to follow the procedures of Sections 508 and 510 of RPSA in order to provide service on the Newtown-Fox Chase line because, on the effective date of NRSA, which added these sections to RPSA, Conrail had already been relieved of any responsibility to provide service on that line. As to the other rail service that SEPTA intended to operate with its own employees, the Court stated:

> "[A] commuter authority which was employing Conrail to render commuter service on the effective date of [NRSA] could not operate that service on its own account or have Amtrak Commuter operate the service for it under adequate payment without propelling itself down the path described in §§ 508 and 510."

Appendix A36. The Court also rejected arguments that application of Sections 508 and 510 of RPSA to SEPTA was unconstitutional. The Court found that, regardless of whether NRSA impaired Pennsylvania's ability to structure integral governmental functions, it was constitutional

because it served "important interests" of the Federal Government. Appendix A42.

The Court called upon the parties to attempt to agree on a form of judgment. When those efforts failed, the Court issued Judgment on March 9, 1982. Paragraph 1 of the Special Court's March 9, 1982 Judgment provides:

> "Prior to January 1, 1983, the Southeastern Pennsylvania Transportation Authority ("SEPTA") may not lawfully commence the direct operation of any commuter service, as defined in § 1135(b) of the Northeast Rail Service Act of 1981 ("NRSA"), on any rail line upon which Conrail was providing service for SEPTA on the effective date of NRSA, August 13, 1981, without having previously completed the negotiation and arbitration procedure set forth in §§ 508 and 510 of the Rail Service Passenger Act [sic] as amended by § 1145 of NRSA. The Court retains jurisdiction with respect to the obligations of SEPTA after January 1, 1983."

Appendix A44-A45. SEPTA respectfully asks that a writ of certiorari issue to review this portion of the Special Court's Judgment.

REASONS FOR GRANTING THE WRIT

The Special Court's decision in this case gives the federal legislature plenary power to regulate and control local transportation. In so doing, it misinterprets the Tenth Amendment to the U. S. Constitution and this Court's decisions in *National League of Cities v. Usery*, 426 U. S. 833 (1976), and *Hodel v. Virginia Surface Mining Reclamation Association, Inc.*, 452 U. S. 264, 101 S. Ct. 2352 (1981). The Special Court's decision should be reversed both because it is wrong on the merits and because it renders the *National League of Cities* and *Hodel* decisions meaningless by permitting them to be avoided by any demonstration of an "important" federal interest. By holding SEPTA subject to the labor relations provisions of NRSA, the Special Court prevents the Commonwealth of Pennsylvania from regulating the provision of mass transportation in its metropolitan areas, an integral and essential governmental function, and thereby prevents SEPTA from providing transportation to the people of the Philadelphia metropolitan region in an efficient and economical manner, as required by its statutory mandate.[7]

The Special Court's decision holding SEPTA subject to Sections 508 and 510 of RPSA should also be reversed because it rests on an incorrect reading of NRSA. The Special Court has read into NRSA requirements of exclusivity nowhere found in the statute itself, and has interpreted NRSA in a manner inconsistent with past federal rail legislation. That legislation, and NRSA as correctly read, are intended to provide States with a means to assure the continuance of necessary public transportation. They are not intended to create onerous procedures and requirements which disrupt and preempt local transportation planning.

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7. See page 4, n. 2, *supra*.

1. The Special Court's Determination That the Northeast Rail Service Act of 1981 May Constitutionally Be Applied to the Southeastern Pennsylvania Transportation Authority Is Contrary to the Tenth Amendment to the Constitution and to Past Decisions of This Court.

In *National League of Cities v. Usery*, 426 U. S. 833, 855 (1976), this Court ruled that in order to preserve the States' separate and independent existence in the federal system, the federal legislature may not "force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made."[8] In *Hodel v. Virginia Mining & Reclamation Association, Inc.*, 452 U. S. 264, 101 S. Ct. 2352 (1981), the Court set forth the standards a party must meet in challenging federal legislation under the reasoning of *National League of Cities:*

> "First, there must be a showing that the challenged statute regulates 'the States as States' . . . . Second, the federal regulation must address matters that are indisputably 'attributes of state sovereignty' . . . . And, third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.'"

Id. at 101 S. Ct. 2366 (citations omitted).

The Special Court, in the present case, did not decide whether mass transportation, including high-speed pas-

8. Specifically, *National League of Cities* held that application of the minimum wage and maximum hour provisions of the Fair Labor Standards Act, 29 U. S. C. §§ 201, *et seq.*, to public employers was unconstitutional because their application would "displace the State's freedom to structure integral operations in areas of traditional governmental functions." 426 U. S. at 852.

senger rail service, is an "integral" and "traditional" state function protected from federal interference under *National League of Cities* and *Hodel*. It did not adopt the statutory pronouncement of the Commonwealth of Pennsylvania that transportation is an essential governmental function, Pennsylvania Urban Mass Transportation Law § 3, 55 P. S. § 600.342, or follow the many lower-court decisions which so hold.[9]

The Special Court also did not decide whether NRSA's requirements would directly impair Pennsylvania's ability to structure its delivery of transportation services. That NRSA would so interfere is clear from the breadth and pervasiveness of its requirements. It would dictate: (a) the number, identity and seniority rights of Conrail employees to be employed by SEPTA; (b) the identity of the unions SEPTA must recognize as the collective bargaining representatives of its employees; (c) the method by which SEPTA must conduct collective bargaining negotiations with those employees; and (d) that the Railway Labor Act, 45 U. S. C. §§ 151, *et seq.*, rather than state labor laws, control all future dealings between SEPTA and its passenger rail employees.

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9. *See United Transportation Union v. Long Island Rail Road Co.*, 634 F. 2d 19 (2d Cir. 1980), *cert. granted*, 101 S. Ct. 3107 (1981); *Amersbach v. City of Cleveland*, 598 F. 2d 1033 (6th Cir. 1979); *Alewine v. City Council of Augusta*, 505 F. Supp. 880 (S. D. Ga. 1981), *appeal docketed*, No. 81-7490 (11th Cir. June 5, 1981); *Dove v. Chattanooga Area Regional Transportation Authority*, Civ. A. No. 1-80-249 (E. D. Tenn. July 21, 1981), *appeal docketed*, No. 81-5636 (6th Cir. September 2, 1981); *Francis v. City of Tallahassee*, Case No. 79-446 (2d Cir. December 8, 1980); *Kramer v. New Castle Area Transit Authority*, Civ. A. No. 80-1008G (W. D. Pa. June 11, 1981), *appeal docketed*, No. 81-2223 (3d Cir. August 10, 1981); *San Antonio Metropolitan Transit Authority v. Donovan*, No. SA-79-CA-457 (W. D. Tex. November 17, 1981), *appeal docketed*, No. 82-1028 (5th Cir. January 14, 1982).

Rather than decide these issues, the Special Court stated that it preferred to leave them to the Supreme Court to decide in *United Transportation Union v. Long Island Rail Road Co.*, 634 F. 2d 19 (2d Cir. 1980), *cert. granted*, 101 S. Ct. 3107 (1981). In that case, the Second Circuit held that the Tenth Amendment, as interpreted by *National League of Cities*, requires that the Railway Labor Act give way to the no-strike provisions of New York's Taylor Law, New York Civ. Serv. Law § 210 (McKinney 1973 & Supp. 1980-1981). Affirmance of the Second Circuit's decision would demonstrate conclusively that the transportation services at issue in the present case are "integral" and "traditional" governmental functions. A reversal, however, would not decide this case. Unlike the Long Island Rail Road, SEPTA transports no freight, makes no freight interchanges and receives no direct revenue from freight. SEPTA has never been subject to the Railway Labor Act or other federal statutes regulating railroads. Furthermore, the intrusive effects of NRSA are unique and, in SEPTA's opinion, more pervasive than those of either the Railway Labor Act or the Fair Labor Standards Act. The pendency of *United Transportation Union v. Long Island Rail Road Co.* thus should not stand in the way of a grant of certiorari in the present case.

Having sidestepped the issues of whether passenger rail service is an integral and traditional governmental function and whether NRSA directly impairs a State's freedom to structure integral operations, the Special Court relied exclusively on a self-styled balancing test. The Court held that NRSA was applicable to SEPTA because of "the important interests of the federal government that are at stake." Appendix A42. In allowing intrusive federal regulation of a State's integral governmental function to stand because of an unwarranted determination that the regulation serves "important" federal interests, the Special

Court unjustifiably narrowed the scope of the Tenth Amendment as interpreted by *National League of Cities* and *Hodel* and has unduly limited its future application.

Justice Blackmun, in his concurring opinion in *National League of Cities*, stated his understanding that the majority's opinion adopted an approach of balancing federal and state interests. However, in *Hodel*, this Court indicated that a balancing of federal and state interests is not itself the underlying test to be applied. Instead, after setting forth the standards to be met in a successful Tenth Amendment challenge to federal regulation,[10] the Court observed in a footnote that even if those standards are met, "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies State submission." 101 S. Ct. at 2366 n. 29. While the Court did not define what interests would be sufficient to override the standards, such interests must be rare or the standards spelled out in the *Hodel* opinion would be meaningless. Certainly, the Court did not state that a balancing test like that employed by the Special Court is the sole test that need be applied.

Even if one were to rely on a balancing of federal and state interests, it is apparent that the Special Court misunderstood those interests. There is no urgent federal interest at stake here. Asserted federal interests such as preserving passenger rail service in the Northeast and providing jobs for Conrail employees are unconvincing in light of the fact that NRSA does not require that any commuter rail service be continued or provided. Similarly, the claim that the government, in enacting NRSA, sought to "preserve labor peace and employee morale," Appendix A42, cannot justify federal regulation of local transportation systems. These vague and amorphous aims must not be

10. The standards are quoted at page 10, *supra*.

allowed to override the Tenth Amendment as interpreted by *National League of Cities* and *Hodel*. Policy goals like those relied upon by the Special Court could be asserted for any federal regulation, including that at issue in the *National League of Cities* case itself.

Indeed, insistence that the Federal Government has any overriding interest in the operation of local passenger rail service rings false in view of its reduction and intended elimination of financial support for the operation of such service. The discontinuance of all federal operating aid to SEPTA is imminent. This fact renders federal regulations such as those contained in NRSA unjustifiable. The Federal Government surely must not be permitted to have an increasing role in ordering the management of a state government function at the very time that it requires the States to assume responsibility for the funding and operation of that function.

Acceptance of the proposition that a State's interests in ordering integral governmental functions must give way to "important" federal interests will render meaningless the principles set forth in *National League of Cities* and *Hodel*. Certainly the Federal Government would not pass a law which it did not consider "important." The Special Court's decision would permit the Federal Government, in the name of any general policy interest, to require the States to provide necessary functions in a certain manner, tying the States' hands and preventing them from providing those essential services as efficiently and economically as possible. This is the very evil that the Tenth Amendment was designed to avoid.

This Court should reverse the Special Court's decision not only because it is incorrect on the merits, but because it renders virtually meaningless the Tenth Amendment to the U. S. Constitution as interpreted by *National League of Cities* and *Hodel*.

2. The Special Court's Interpretation of the Northeast Rail Service Act of 1981 Is Incorrect and Contrary to the Long History of Federal Railroad Legislation and Places Severe Restrictions on Efforts to Save Passenger Rail Service in the Northeast.

The Special Court, in its Opinion of January 27, 1982, addressed, for the first time, important issues regarding the proper interpretation of the Northeast Rail Service Act of 1981. These issues are of immense significance to SEPTA, to other state transportation authorities throughout the Northeast, and to the hundreds of thousands of people who rely on passenger rail service every day. These issues, because of their significance, and because they will recur until definitively settled, should be decided by this Court.

Rail legislation in the United States traditionally has left state transportation authorities free to operate passenger rail service, if at all, in the manner they found most efficient and economical. The Regional Rail Reorganization Act of 1973, 45 U. S. C. §§ 701, *et seq.*, and the Railroad Revitalization and Regulatory Reform Act, 45 U. S. C. §§ 801, *et seq.*, provided safety nets on which a state transit authority could rely to assure the continuation of passenger rail service. Neither act required a state transit authority to avail itself of the procedures set forth therein. Transit authorities have been free to operate service with their own employees or through an independent contractor, or to abandon service altogether. They have been free to do this even though such actions would result in the loss of work to many employees of the bankrupt railroads.

Despite this history, the Special Court held that if a transit authority intends to operate passenger rail service now operated by Conrail, it *must* negotiate an implementing agreement to determine the Conrail employees to be transferred to it and negotiate collective bargaining

agreements with the representatives of those employees. The effect of this holding is that a state transit authority will not be permitted to choose freely the employees it wants to operate its service and those non-Conrail employees who are employed to provide passenger rail service may well be precluded from choosing a collective bargaining representative. If they work at the same jobs as former Conrail employees, they may have no choice but to accept representation by the numerous craft unions presently representing Conrail's employees. SEPTA also will be faced with the prospect of having its relations with some employees governed by state law while its relations with others are governed by federal laws, including the Railway Labor Act. Finally, state transit authorities like SEPTA will be forced to negotiate with the very rail unions whose expensive contracts and outdated work rules have made passenger rail service a losing venture for decades.

Sections 508 and 510 of RPSA require a public transit authority that intends to operate commuter service to enter into negotiations with "the representatives of employees to be transferred." The plain meaning of this provision is that if a transit authority intends to use only its own employees, no Conrail employees will be transferred and no negotiations will be required.[11] This reading is consistent with past rail legislation that always has left transit authorities free to operate rail service using their own employees.

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11. The fact that the "to be transferred" language also appears in Section 508(b) of RPSA which describes Amtrak Commuter's obligations is by no means conclusive. Amtrak Commuter is a new organization with no employees and no experience in transportation matters. The fact that Amtrak Commuter may be required to hire Conrail employees and negotiate with their representatives does not imply that well-established transit authorities with their own employees and employee representatives must do likewise.

The present administration has made it quite clear that local mass transportation is the financial responsibility of the States. If SEPTA is to assume this responsibility successfully, it must have the ability to make its own employment decisions. The Special Court's interpretation of NRSA denies state transit authorities this necessary flexibility and makes more likely the very real possibility that the public soon will be denied a vital public service on which it has relied for years.

CONCLUSION

For the reasons set forth above, a w it of certiorari should issue to review the Judgment and Opinion of the Special Court, Regional Rail Reorganization Act of 1973.

Respectfully submitted,

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Dated: March 29, 1982

Appendix

APPENDIX A

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973

Civil Action No. 81-8

RAILWAY LABOR EXECUTIVES' ASSOCIATION
400 First Street, NW
Washington, DC 20001,

Plaintiff,

v.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,
130 South Ninth Street
Philadelphia, PA 19107,

Defendant,

and

CONSOLIDATED RAIL CORPORATION,
Six Penn Center Plaza
Philadelphia, PA 19104,

Rule 19 Party.

Before FRIENDLY, *Presiding Judge*, and WISDOM and THOMSEN, *Judges*.

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FRIENDLY, *Presiding Judge:*

This is an action of which we have jurisdiction under § 1152(a) of the Northeast Rail Service Act of 1981 (NRSA) which grants this court original and exclusive jurisdiction over any civil action "for injunctive, declaratory or other relief relating to the enforcement, operation, execution, or interpretation of any provision or amendment" made by it.[1] Section 1136 of that Act provided that:

> Notwithstanding any other provision of law or contract, Conrail shall be relieved of any legal obligation to operate commuter service on January 1, 1983.

At issue here is whether Southeastern Pennsylvania Transportation Authority (SEPTA) is subject to the obligations

1. NRSA constituted Subtitle E of Title XI of the Omnibus Budget Reconciliation Act of 1981, P.L. 97-35, 95 Stat. 357. It was enacted and became effective August 13, 1981.

imposed by § 1145 of NRSA with respect to employees of Consolidated Rail Corporation (Conrail) on certain commuter lines in the Philadelphia, Pa., area of which it had acquired the track and rolling stock in 1976 and 1979 pursuant to § 206 of the Regional Rail Reorganization Act (RRRA) for a total payment of approximately $10.2 million. While the case initially centered on SEPTA's decision to begin operations on a 15.2 mile line between Fox Chase and Newtown, Pa., without complying with the procedures of § 1145, which it claims to be inapplicable on both statutory and constitutional grounds, the scope of the case was broadened after SEPTA's announcement that it intends early in 1982 to follow a similar course with respect to all the commuter services which it conducts out of the Reading Terminal in Philadelphia center city.

I. The History of the Dispute

Plaintiff Railway Labor Executives' Association (RLEA) is an unincorporated association comprising the chief executive officers of a number of standard national and international railway labor unions in the United States, including many having collective bargaining agreements with Conrail, which were negotiated in accordance with the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, and the RRRA, 45 U.S.C. § 771 *et seq.*

SEPTA is a corporation organized under the Pennsylvania Urban Mass Transportation Law, Act of January 22, 1968, P.L. 42, No. 8, as amended by the Act of July 10, 1980, P.L. 427, No. 101, 55 P.S. § 600.101 *et seq.*, to "exercise the public powers of the Commonwealth as an agency and instrumentality thereof", *id.* § 600.303(a). It, and its predecessors, have long furnished a variety of passenger services in the Philadelphia area by buses, trolleys, subways and elevated railroads; its employees are also

represented by unions under collective bargaining agreements negotiated pursuant to Pennsylvania's Public Employee Relations Act, Act of July 23, 1970, P.L. 563, No. 195, 43 P.S. § 1101.101 *et seq.* SEPTA is one of the "commuter authorities" expressly mentioned in the definition section of NRSA, § 1135(a)(3). Conrail, which was organized pursuant to § 301 of RRRA, carries property for hire in interstate commerce under the Interstate Commerce Act, 49 U.S.C. § 1 *et seq.*, and operates commuter rail service when subsidized by state or local governments pursuant to RRRA.

Before April 1, 1976, SEPTA subsidized commuter rail service on 13 lines radiating from center city Philadelphia operated by the Reading and Penn Central railroads and later by their reorganization trustees, serving the five southeastern Pennsylvania counties of Bucks, Chester, Delaware, Montgomery and Philadelphia.[2] Since the transfer of these properties to Conrail on April 1, 1976, Conrail has continued to operate the commuter service formerly furnished by the transferors and has received financial assistance from SEPTA as provided in § 304(e) of RRRA.

The difficulties giving rise to this action began when SEPTA determined in late 1980 that the rail diesel car (RDC) portion of the commuter service being provided by Conrail was too costly and should be discontinued. In April 1981 SEPTA made to Conrail its offer of financial assistance for the period July 1, 1981—June 30, 1982. This included elimination of all RDC service including that between Fox Chase and Newtown. Conrail regarded the subsidy offer as insufficient and on June 26, 1981, posted notices pursuant to § 304 of the RRRA that it would cease to operate commuter rail service on August 30, 1981. On

2. Some of these commuter lines extended to New Jersey and Delaware. SEPTA proposes to discontinue service outside Pennsylvania.

August 11 SEPTA offered to provide approximately $25 million in subsidy to cover Conrail's operation of non-diesel service from July 1 through December 31, 1981. Conrail accepted this on August 20.[3] We were told at argument that the contract has been further extended to March 31, 1982.

On June 29, 1981, Conrail issued a bulletin that service between Fox Chase and Newtown would cease at 12:01 A.M. on July 1. SEPTA then began a program to repair that line and accommodated passengers by providing bus service between stations on the Fox Chase-Newtown segment and an adjacent line. On October 5, 1981, SEPTA commenced what it terms "high-speed passenger service" on the Fox Chase-Newtown segment.[4] This was operated by SEPTA employees, who are members of the Transport Workers Union; none of the Conrail employees who had previously operated the segment were transferred to SEPTA.

Before the commencement of SEPTA's Fox Chase-Newtown service RLEA brought this action against SEPTA and joined Conrail as a party under F. R. Civ. P. 19. The

3. SEPTA's offer stated:

> As you know, SEPTA also anticipates assuming direct responsibility for the Reading District on January 1, 1982. This is an extremely complex undertaking and SEPTA will need a substantial volume of information and assistance from Conrail over the next several months. Conrail's fulfillment of its stated intentions to cooperate fully in the transition effort is essential to our task.

4. As developed at argument, the service which SEPTA operates between Fox Chase and Newtown and intends to operate out of the Reading Terminal is at no higher speed than that formerly operated. The "high speed" terminology is rather an expression of hope that different types of equipment and operations, made feasible in part by less burdensome labor agreements, might provide service at higher speed and lower costs.

complaint sought a declaratory judgment that under § 508, which § 1145 of NRSA added to the Rail Passenger Service Act, SEPTA was required to negotiate and arbitrate if necessary an implementing agreement with Conrail and the labor organizations representing Conrail employees to be transferred to SEPTA incident to the Fox Chase-Newtown operation. A temporary restraining order and preliminary and permanent injunctive relief were also sought.

After hearing argument on October 5, 1981, this court denied the request for a temporary restraining order. We also directed that the motion for a preliminary injunction be considered together with a trial on the merits pursuant to F. R. Civ. P. 65(a)(2) and urged the parties to enter into a stipulation of facts. They entered into such a stipulation, accompanied by numerous exhibits; as a result of certain questions raised at oral argument they have supplemented their stipulation. Since the argument on the temporary restraining order had indicated that the dispute over the Fox Chase-Newtown segment might be only a small part of a much larger controversy that would be precipitated when SEPTA implemented its decision to operate all commuter service out of the Reading Terminal early in 1982 with its own employees and others to be recruited and not to enter into any negotiations with respect to the transfer of Conrail employees, we suggested that RLEA amend its complaint so that the broader as well as the smaller issue might be before us. RLEA did this; the amended complaint further alleged that SEPTA was and would be in violation of § 510, also added to the Rail Passenger Service Act by § 1145 of NRSA. Since one of SEPTA's contentions was that if RLEA's construction of the statute was correct, §§ 508 and 510 would be unconstitutional under *National League of Cities v. Usery*, 426 U.S. 833 (1976), we certified to the Attorney General, pursuant to 28 U.S.C. § 2403(a), that the constitutionality of an act

of Congress had been drawn into question. The United States thereupon moved for and was granted leave to participate as *amicus curiae*. Its brief is limited to the constitutional question and urges that *National League of Cities* is inapplicable. Conrail's main brief concerns itself only with the question of statutory construction and essentially supports the position of RLEA. We heard argument on December 21, 1981.

II. Statutory Setting

In order to understand the problem of statutory construction posed by this action it is necessary to place the new sections 508 and 510 of the Rail Passenger Service Act in their setting. As stated at the outset, § 1136 of NRSA relieves Conrail of any legal obligation to operate commuter service on January 1, 1983. Section 1137 of NRSA adds a number of new sections to the Rail Passenger Service Act. Section 501 provides for the establishment no later than November 1, 1981, of a wholly-owned subsidiary of Amtrak to be known as Amtrak Commuter Services Corporation (Amtrak Commuter). This was to be "a contract operator of commuter service on behalf of the commuter authorities that contract with" it for such operation; it was to "have no common carrier obligation to operate either passenger or freight service", § 501 (b)(2). Section 504(a) authorizes Amtrak Commuter to operate commuter service under an agreement with a commuter authority. Section 504(b)(1) provides that "Amtrak Commuter shall operate commuter service which Conrail was obligated to provide on the effective date of this title under section 303(b)(2) or 304(e) of the Regional Rail Reorganization Act of 1973, and may operate any other commuter service", if the commuter authority for which service is to be operated offers to provide a "commuter

service operating payment" as there defined. Section 504 (g) instructs:

> Notwithstanding any other provision of this section, Amtrak Commuter is not obligated to provide commuter service if a commuter authority operates the service itself or contracts for the provision of such service by an operator other than Amtrak Commuter. In any such case, Amtrak Commuter shall, where appropriate, provide the commuter authority or such other operator with access to the rail properties needed to operate such service.

The process is further described in § 506 entitled "Property Transfer". This begins by directing, § 506(a), that

> Not later than April 1, 1982, each commuter authority shall notify Amtrak Commuter and Conrail whether it intends to operate its own commuter service or to contract with Amtrak Commuter for the operation of such service.

Section 506(b) directs that "(1) A commuter authority may initiate negotiations with Conrail for the transfer of commuter services operated by Conrail" and that such an agreement shall specify at least the service responsibilities to be transferred, the rail properties to be conveyed, and a transfer date not later than January 1, 1983. Any such transfer agreement shall be entered into not later than September 1, 1982, § 506(b)(3).

Section 506(c) provides:

> (c) Not later than September 1, 1982, Conrail and Amtrak Commuter shall agree on terms and conditions for the transfer to Amtrak Commuter of all of Conrail's commuter service in the Northeast Corridor,

except for commuter service to be transferred directly to a commuter authority under an agreement entered into under subsection (b) of this section, and any rail properties used or useful for the operation of such commuter service. Such service and properties shall be transferred to Amtrak Commuter not later than January 1, 1983.

Sections 506(e), (f) and (g) provide:

(e) Following the transfer of commuter service and properties to Amtrak Commuter, and upon the request of any commuter authority for which the service is provided by Amtrak Commuter, Amtrak Commuter and such commuter authority shall agree upon terms and conditions for the transfer to the commuter authority of such service and any rail properties used or useful in the operations of such commuter service.

(f) If, within 90 days after a request for the transfer of commuter services is made by a commuter authority under subsection (e), Amtrak Commuter and such commuter authority do not sign an agreement pursuant to subsection (e) of this section, Amtrak Commuter or the commuter authority may appeal to the Secretary. Upon such appeal the Secretary shall determine which rail properties shall be transferred and the terms and conditions of such transfer.

(g) Consideration for inventory, including tools, spare parts, and fuel, transferred under this section shall be based on book value. The transfer of fixed facilities and rolling stock under this section shall be without consideration.

Section 1139 authorizes an appropriation to the Secretary of Transportation in the fiscal year ending September 30, 1982, not to exceed $50,000,000 "to facilitate the

transfer of rail commuter services from Conrail to other operators."

Section 1145 adds to the Rail Passenger Service Act the labor provisions, § 508 and § 510, which are directly involved in this case. These read:

> Sec. 508. TRANSFER OF EMPLOYEES.
>
> (a) Not later that May 1, 1981, Conrail, commuter authorities that intend to operate commuter services, and representatives of the various crafts or classes of employees of Conrail to be transferred to the commuter authorities shall enter into negotiations for an implementing agreement in accordance with subsection (c) of this section.
>
> (b) Not later than May 1, 1981, Conrail, Amtrak Commuter, and representatives of the various crafts or classes of employees of Conrail to be transferred to Amtrak Commuter shall enter into negotiations for an implementing agreement in accordance with subsection (c) of this section.
>
> (c) Such negotiations shall—
>
> (1) determine the number of employees to be transferred to Amtrak Commuter or a commuter authority;
>
> (2) identify the specific employees of Conrail to whom Amtrak Commuter or a commuter authority offers employment;
>
> (3) determine the procedure by which such employees may elect to accept employment with Amtrak Commuter or a commuter authority;
>
> (4) determine the procedure for acceptance of such employees into employment with Amtrak Commuter or a commuter authority;

(5) determine the procedure for determining the seniority of such employees in their respective crafts or classes in Amtrak Commuter or with a commuter authority which shall, to the extent possible, preserve their prior seniority rights;

(6) ensure that all such employees are transferred to Amtrak Commuter or a commuter authority no later than January 1, 1983; and

(7) ensure the retention of prior seniority on Conrail of employees transferring to Amtrak Commuter or a commuter authority and determine the extent and manner in which such employees shall be permitted to exercise such seniority in order to (A) provide employees transferred to Amtrak Commuter or a commuter authority at least one opportunity every six-month period to exercise previous freight seniority rights, (B) maximize employment opportunities for employees on furlough, (C) maintain the ability to recall experienced employees, (D) ensure that under no circumstances are seniority rights exercised in any manner which results in any disruption of service or a position being filled which would otherwise not be filled under the terms of any crew consist, fireman manning, or other similar agreement, and (E) ensure that Conrail has the right to furlough one employee in the same craft or class for each employee who returns from Amtrak Commuter or a commuter authority by exercising seniority.

(d)(1) If agreements with respect to the matters being negotiated pursuant to this section are not reached by August 1, 1982, the parties to the negotiations shall, within an additional 5 days, select a neutral referee. If the parties are unable to agree upon the selection of such a referee, the National Mediation Board shall immediately appoint a referee.

(2) The referee shall commence hearings on the matters being negotiated pursuant to this section not later than 5 days after the date he is selected or appointed, and shall render a decision within 20 days after the date of commencement of such hearings. All parties may participate in the hearings, but the referee shall have the only vote.

(3) The referee shall resolve and decide all matters in dispute with respect to the negotiation of the implementing agreement or agreements. The referee's decision shall be final and binding to the same extent as an award of an adjustment board under section 3 of the Railway Labor Act, and shall constitute the implementing agreement or agreements between the parties. The National Mediation Board shall fix and pay the compensation of such referees.

(e) If Amtrak Commuter transfers commuter service and properties to a commuter authority under Section 506 of this title, Amtrak Commuter, the commuter authority, and representatives of the various crafts or classes of employees to be transferred to the commuter authority shall enter into an implementing agreement in accordance with subsection (c) of this section. If no agreement is reached by the date service and properties are transferred, the dispute shall be resolved by a neutral referee in accordance with subsection (d) of this section.

(f) Any employee of Conrail who is not offered employment with Amtrak Commuter or a commuter authority under agreements entered into under this section shall be provided employee protection under section 701 of the Regional Rail Reorganization Act of 1973 to the same extent as if such employee had remained in the employ of Conrail.

Sec. 510. COLLECTIVE BARGAINING AGREEMENT FOR AMTRAK COMMUTER OR COMMUTER AUTHORITIES.

(a)(1) Not later than September 1, 1982, the commuter authorities that intend to operate commuter service and the representatives of the various classes or crafts of employees to be transferred to such commuter authorities under agreements entered into under section 508 of this Act shall enter into new collective bargaining agreements with respect to rates of pay, rules, and working conditions.

(2) Not later than September 1, 1982, Amtrak Commuter and the representatives of the various classes or crafts of employees to be transferred to Amtrak Commuter under agreements entered into under section 508 of this Act shall enter into new collective bargaining agreements with respect to rates of pay, rules, and working conditions.

(b) If the parties have not reached an agreement by the date specified in subsection (a) of this section, any party to the dispute or the Governor of any State through which the service that is the subject of the dispute is operated may, within 15 days after such date, request the President to establish an emergency board pursuant to subsection (c) of this section.

(c) Within 15 days after the request under subsection (b) of this section, of a party or a Governor, the President shall create an emergency baord. Such board shall conduct a public hearing on the dispute at which each party shall appear and provide testimony, and shall, within 30 days after the date of its creation, report on the dispute.

(d) If no settlement in the dispute is reached within 10 days after the report of the emergency board, such

board shall require the parties to the dispute to submit, within 15 days, final offers to the board for settlement of the dispute.

(e) Within 15 days after the submission of final offers, the emergency board shall submit a report to the President setting forth its selection of the most reasonable offer.

(f) If the emergency board selects a final offer submitted by a carrier and the employees of such carrier engage in any work stoppage arising out of the dispute, such employees shall not be eligible during the period of such work stoppage for benefits under the Railroad Unemployment Insurance Act.

(g) If the emergency board selects a final offer submitted by the employees and the carrier refuses to accept such offer, the carrier shall not participate in any benefits of any agreement between carriers which is designed to provide benefits to such carriers during a work stoppage.

(h) The provisions set forth in this section shall be the exclusive means for resolving any dispute relating to entering into an initial collective bargaining agreement between Amtrak Commuter or a commuter authority, as the case may be, and representatives of the various classes or crafts of employees to be transferred to Amtrak Commuter or such commuter authority.

Also relevant are the addition of § 509, reproduced in the margin,[5] and § 1157 of NRSA which amends the Railway

5. SEC. 509. FACTFINDING PANEL.

(a) Amtrak Commuter or a commuter authority and the representatives of the various classes and crafts of employees to be transferred to Amtrak Commuter or such commuter authority shall, by May 1, 1982, establish a factfinding panel,

Labor Act so as to make it applicable to any dispute subject to that Act between a publicly funded and publicly operated carrier providing rail commuter service (including Amtrak Commuter) and its employees.

III. The Meaning of the Statute

The parties' dispute focuses principally upon a single statutory provision—§ 508(a) of NRSA.[6] RLEA and Conrail argue that since SEPTA is a commuter authority "that intend[s] to operate commuter service", the plain language of § 508(a) directs that it "shall enter into negotiations for [a labor transfer] implementing agreement". If an agreement cannot be reached, § 508(d) subjects the parties to binding arbitration to determine, *inter alia*, "the number of [Conrail] employees to be transferred to" SEPTA, "the specific employees of Conrail to whom [SEPTA] offers employment", and "the procedure for determining the seniority" of employees transferred to SEPTA. SEPTA replies that § 508(a) was not intended to be mandatory and that it is free to ignore NRSA's labor transfer provi-

5. (Cont'd)

chaired by a neutral expert in industrial relations, for purposes of recommending changes in operating practices and procedures which would result in greater productivity to the maximum extent practicable.

(b) The National Mediation Board shall appoint public members to the panel established under subsection (a) of this section.

(c) The factfinding panel shall, by July 1, 1982, submit a report to the parties setting forth its recommendations for changes in operating practices and procedures.

(d) The factfinding panel may provide mediation, conciliation, and other assistance to the parties.

6. By its terms § 510(a) is applicable only in instances in which § 508(a) has already operated.

sions and to hire whomever it desires to man the commuter services it intends to provide.

Before proceeding with a more detailed and critical textual analysis and with a consideration of the legislative history, it will be useful to set forth the positions of the parties with respect to the economics of the situation. Each party insists that an interpretation contrary to its own would have adverse economic consequences which Congress could not have contemplated.

SEPTA contends that the huge deficits experienced in commuter services have been caused in considerable part by the fact that the work, wages and other benefits of the Conrail employees providing those services were governed by a multitude of collective bargaining agreements inherited from Conrail's predecessors which included highly uneconomic work rules. See Northeast Corridor Commuter Rail Authorities Committee (NECCRAC), Report on Conrail Labor Issues, dated May 28, 1981, pp. 22-28. Efforts to obtain relief from these allegedly have been hindered by the absence of any final and binding dispute settlement procedure under the Railway Labor Act. *Id.* at 34. Moreover Conrail allegedly has shown little interest in seeking changes in its labor agreements to meet the special problems of commuter service. Since these were largely subsidized by commuter authorities, Conrail has concentrated its bargaining efforts on obtaining concessions beneficial to its freight services. Congress could not have intended, so the argument runs, to burden a commuter authority, able and willing to make a fresh start, with these residues of the past; rather Congress meant to allow such an authority to decline to accept transfers of employees from Conrail, make its own decisions as to whom to hire (which, of course, could include Conrail employees preferring to keep at their previous work) and negotiate collective bargaining agreements under state labor laws.

RLEA and Conrail respond that Congress, unwilling itself to weigh such contentions as against the conflicting ones of Conrail, hereafter discussed, directed that such economic considerations be presented to the referee under § 508(d), the factfinding panel under § 509 and the emergency board under § 510. They also point out that under § 510(a)(1) there are to be new collective bargaining agreements, not simply a continuation of the Conrail agreements. SEPTA replies that similar procedures have been attempted in the past but have shattered on the rocks of union intransigence and the threat, or actuality, of a strike—a threat which § 510 does not eliminate.

The economic contentions of RLEA and Conrail center upon the severe adverse effects on Conrail of a refusal by commuter authorities to accept the transfer of the Conrail employees who have been operating the services subsidized by the authorities. There were some 10,500 such employees, over 1,700 of whom serve the Philadelphia metropolitan area. Conrail's Vice President-Labor Relations averred in an affidavit attached to its brief that exercise of seniority rights by Conrail employees who would lose their present jobs if SEPTA followed the course here proposed would have a number of untoward results. Some 450 conductors and trainmen would be free to exercise their seniority in freight service. This would displace an equivalent number of other Conrail employees, saddling Conrail with retraining costs and partially frustrating the agreement Conrail had achieved with the United Transportation Union, whereby freight trains may be operated with a conductor and only one trainman rather than two. Displaced engineers and firemen, principally engineers, could move back into similar ranks in freight service and might even be able to demand firemen positions which Conrail can now leave vacant as unneeded. Here also there would be retraining costs. Non-

operating employees could also exercise seniority rights. The bumping of junior employees would result in lowered employee morale and possible labor unrest, and would impose additional burdens on the federally financed employee protection plan authorized under § 701 of the RRRA as amended by § 1143(a) of NRSA.[7] Whereas § 508(c)(7), added to the Rail Passenger Service Act by NRSA, permits Conrail to furlough one employee for every employee who, after being employed by Amtrak Commuter or a commuter authority, exercises seniority rights to return to Conrail, Conrail considers it questionable whether the furlough privilege extends to the case where an employee has never been employed by Amtrak Commuter or a commuter authority. The force of all these considerations would be augmented if other commuter authorities were to follow SEPTA's example.[8]

Although the economic contentions of both sides have force, we think those of RLEA and Conrail outweigh those of SEPTA in pointing to the probable intention of Congress. NRSA was part of the Omnibus Budget Rec-

7. The increased cost arises because employees with seniority dates prior to the date of the respective agreements have the right to fill second brakemen positions that could otherwise be vacant so long as the alternative would be furlough.

8. The New York Metropolitan Transportation Authority and the Connecticut Department of Transportation already own all the commuter route miles which they operate, and the New Jersey Transit Authority owns 384 miles out of 486 operated. Options for Conrail, Conrail's Response to Section 703(c) of the Staggers Rail Act of 1980, dated April 1, 1981, Table 9-2. According to the Stipulation of Facts, ¶¶ 20 and 23, SEPTA owns 130 route miles of the 246 over which Conrail had been providing passenger service, with Conrail owning only 15 and Amtrak 99. The figures in Table 9-2 are different, showing SEPTA as owning 158, Conrail 101 and Amtrak 78 route miles. We understand that most commuter authorities also own the rolling stock.

oncilation Act, the object of which was to save money for the federal government. The primary purpose of NRSA as outlined in §§ 1132 and 1133 was to reduce federal subsidization. This was to be done by making Conrail a profitable carrier or, failing that, to provide for the transfer of its freight operations to private hands. Termination of Conrail's involvement with commuter operations was deemed essential to that goal. It would not seem likely that Congress intended some commuter authorities electing to provide their own commuter services to be able to aggravate Conrail's situation by refusing to employ any of the Conrail employees who have been engaged in services Conrail had continued to provide at their request. Congress would have considered it more reasonable to leave determination of how many such employees should follow the service to be settled by agreement or, failing that, by the decision of a referee.

With this background we proceed to a more detailed examination of the text and to the legislative history. As noted above, the RLEA argument[9] that SEPTA must negotiate with representatives of Conrail employees regarding labor transfer implementing agreements is extremely simple. Section 508(a) provides that "Conrail, commuter authorities that intend to operate commuter service, and [representatives of labor] shall enter into negotiations for an implementing agreement [regarding the transfer of Conrail employees to commuter authorities]." SEPTA has made it abundantly clear that it "intend[s] to operate commuter service" on the lines here at issue. Thus, RLEA argues, SEPTA is within the terms of § 508(a) and, as that section provides, SEPTA "shall enter into [labor transfer] negotiations".

9. For the sake of simplicity we shall generally refer to arguments as RLEA's although the same or similar arguments are made by Conrail.

It is difficult to see any basis for disagreeing with RLEA's reading of § 508(a) so long as one focuses solely on that section. The two phrases on which RLEA's argument hangs—"commuter authorities that intend to operate commuter service" and "shall negotiate"—seem clearly to apply to SEPTA.[10] Moreover, there is nothing in the legislative history that suggests that § 508(a) was intended to mean something other than what it seems to say. Indeed, as discussed below, the legislative history supports RLEA's reading of the section.

In order to avoid the force of RLEA's argument, SEPTA makes several arguments in support of its basic contention that NRSA is not mandatory, and thus that commuter authorities may disregard the labor transfer provisions if they choose. SEPTA relies in the first instance on a somewhat tortured reading of § 508(a). SEPTA points to the language emphasized in the following quotation:

> Not later than May 1, 1982, Conrail, commuter authorities that intend to operate commuter service, and representatives of the various crafts or classes of employees of Conrail *to be transferred* to the commuter authorities shall enter into negotiations for an implementing agreement in accordance with subsection (c) of this section. (Emphasis added.)

SEPTA argues that, "[i]f there are no employees being transferred, obviously negotiations are unnecessary." SEPTA Brief at 24. SEPTA concludes that since it decided that no Conrail employees were "to be transferred" to its Fox Chase-Newtown operations (and that no such

10. It should be noted that RLEA's argument lives and dies with § 508(a); there is no other provision in NRSA that supports a claim that SEPTA must negotiate regarding the transfer of Conrail employees. See note 6, *supra*.

transfer is intended for the commuter operations out of Reading Terminal), § 508(a) is inapplicable.

This argument—which relies on the premise "if there are no employees being transferred"—begs the question of who is to decide how many Conrail employees are "to be transferred". RLEA's whole case is that Congress has set up a procedure to do this, and RLEA can point convincingly to § 508(c)(1), which provides that the negotiating process "shall . . . determine the number of employees to be transferred to Amtrak Commuter or a commuter authority". If, as SEPTA claims, it can decide in advance of negotiations that it wants no Conrail employees, then it is hard to see why § 508(c)(1) was included.[11]

Moreover, the phrase "to be transferred" seems addressed to a question entirely different from whether or not § 508(a) requires a commuter authority to negotiate. It makes perfect sense to read the phrase as defining *which labor representatives* are permitted to enter into labor transfer negotiations: representatives of workers who are used only on freight operations, or other non-commuter operations, are not to be included, because the employees these persons represent are not employees "to be transferred". Once the negotiations under § 508(c)(2)—which provides that the labor transfer negotiations are to "identify the specific employees of Conrail" to be transferred—are concluded, then representatives of non-transferable employees will be excluded from the negotiations on subjects set forth in §§ 508(c)(3)-(7).

11. An answer might be that SEPTA would be required to negotiate if it wanted some Conrail employees. Yet a construction whereby the process of negotiation and arbitration which Congress thought desirable could be avoided by a commuter authority's taking the most extreme position and not otherwise is not persuasive.

Lastly, the phrase "to be transferred" is also used in § 508(b), which is identical to § 508(a), except for the fact that it applies to the transfer of Conrail employees to Amtrak Commuter, rather than to commuter authorities:

> Not later than May 1, 1982, Conrail, Amtrak Commuter, and representatives of the various crafts or classes of employees of Conrail *to be transferred* to Amtrak Commuter shall enter into negotiations for an implementing agreement in accordance with subsection (c) of this section. (Emphasis added.)

If the phrase "to be transferred" has the effect of permitting SEPTA—and other commuter authorities—to escape from the statutory negotiating process, then it must have a similar effect with respect to Amtrak Commuter. This result would seem extremely peculiar since Amtrak Commuter was established specifically to take over Conrail's commuter services—a function it is compelled to perform by § 506(c), which provides that "Conrail and Amtrak Commuter shall agree on terms and conditions for the transfer to Amtrak Commuter of *all* of Conrail's commuter service in the Northeast Corridor except for commuter service to be transferred directly to a commuter authority under an agreement entered into under subsection (b) of this section . . ." (emphasis added). Since the phrase "to be transferred" cannot have been meant to give Amtrak Commuter the option of disregarding the statutory procedures established by § 508, it is difficult to argue that the identical phrase, when used a half-dozen lines earlier in the same section, was intended to give commuter authorities such power. For all these reasons, we find SEPTA's reliance on the phrase "to be transferred" unpersuasive.[12]

12. Our conclusion as to the limited effect of the "to be transferred" provision is somewhat reinforced by the provision in § 411

SEPTA's second, and more powerful, argument starts with the observation that NRSA was not intended to set forth the only avenues by which commuter authorities may assume commuter service responsibilities currently satisfied by Conrail.[13] SEPTA rightly points out that NRSA nowhere says that it sets out an exhaustive list of options from which commuter authorities must choose if they desire to provide commuter services. NRSA deals expressly with only two methods of providing commuter services: (1) a commuter authority may contract with Amtrak Commuter for services previously provided by Conrail under contract with a commuter authority, and (2) a commuter authority may provide such services itself. See § 506(a). SEPTA points out, however, that there are several other possible ways in which a commuter authority might act. It is clear that commuter authorities are not required by the new amendments to provide commuter service to their communities, and thus, that they

12. (Cont'd.)
added to the RRRA with respect to freight employees by § 1146(a) of NRSA. Although this used the same "to be transferred" language as § 508 of the Rail Passenger Service Act, it manifestly is mandatory.

13. SEPTA concedes that § 506(a), which provides that "Not later than April 1, 1982, each commuter authority shall notify Amtrak Commuter and Conrail whether it intends to operate its own commuter service or to contract with Amtrak Commuter for the operation of such service", is mandatory. Transcript of Oral Argument at 43. SEPTA argues, and we agree, that this provision does not say in so many words that if an authority elects the first option, it must accept the transfer of enough Conrail employees to man the service. However, given the similarities between the language of §§ 506(a) and 508(a), and the fact that the two sections were introduced into the statute at the same point in the legislative process, pp. 23-25, *infra*, it is difficult, as a matter of statutory construction, to see why § 506(a) should be construed to be mandatory and § 508(a) to be permissive.

are free to pursue a course not mentioned in § 506—namely, abandonment of their service on a line. Likewise, a commuter service might run trains over lines for which Conrail has never been responsible. Most important, SEPTA argues, a commuter authority might choose to contract with a third party for the operation of trains previously run by Conrail. Indeed, the Massachusetts Bay Transportation Authority for some time has contracted with the Boston & Maine Railroad rather than Conrail. See USRA, Conrail at the Crossroads: The Future of Rail Service in the Northeast, at page 30 n.28 (1981); SEPTA Brief at 21 n.23. Support for the proposition that NRSA was not intended to prohibit such arrangements is indicated by § 504(g), which provides that "Amtrak Commuter is not obligated to provide commuter service if a commuter authority operates the service itself or contracts for the provision of such service by an operator other than Amtrak Commuter".

Since NRSA is not an exhaustive list of the commuter authorities' options, SEPTA argues next that § 508's labor transfer provisions are entirely permissive and that a commuter authority has the freedom to choose whether or not to follow them. The argument contains a fatal flaw. The claim that the Act is permissive rests upon the observation that there are options other than those set forth in the section that commuter authorities are permitted to pursue —such as abandonment or contracting with a third party, see *supra*. Based on this observation, SEPTA concludes that even if a commuter authority pursues one of the options set forth in § 506, it may ignore the statutory scheme. This conclusion is not dictated by the premise—that § 506 is not an exclusive list of the options which commuter authorities may pursue. Congress could well have intended that a commuter authority be free to pursue any of a number of alternatives, but that if it chose one of the

options dealt with by the statute, then the statutory framework had to be followed. This interpretation of § 508(a) is supported by the language that Congress used in setting forth the labor transfer procedure. As noted earlier, § 508(a) states flatly that "commuter authorities that intend to operate commuter service . . . shall enter into negotiations . . . ." At least on its face this provision, with its use of the mandatory "shall", supports interpreting the Act as directing that once a commuter authority determines to operate its own commuter service, then NRSA's labor transfer procedures are mandatory. Aside from its reading of the phrase "to be transferred", which we rejected above, SEPTA points to no statutory language that suggests that § 508(a)'s flat statement is not mandatory.

This reading of the Act is supported by NRSA's legislative history.[14] Earlier versions of NRSA were significantly different from the provisions now before us. Most importantly, under S. 1100 the labor transfer provisions of the bill were explicitly linked to the provisions of the Act

14. NRSA has a complicated history. The Act is based on S. 1100, introduced May 4, 1981 by Senator Packwood and referred to the Senate Committee on Commerce, Science, and Transportation, and on H. R. 3559, introduced May 12, 1981 by Representative Florio and referred to the House Committee on Energy and Commerce. Apparently neither bill was debated on the floor. Instead, their respective provisions were incorporated, with various changes, in the House and Senate Budget Reconciliation bills—S. 1377 and H. R. 3982. Differences between these bills were resolved in conference, see Submission of Explanatory Statement of House and Senate Conferees With Respect to Subtitles E, F, and G of Title XI of the Omnibus Reconciliation Bill (H. R. 3982) Submitted by House Committee on Energy and Commerce and Senate Committee on Commerce, Science, and Transportation in Accordance With Section 1199A of H. R. 3982 (hereafter "Explanatory Statement"), *reprinted in* 127 Cong. Rec. H5956-5975 (August 4, 1981) and 127 Cong. Rec. S9056-9074 (July 31, 1981).

dealing with the transfer of services and property from Conrail to a commuter authority. Put differently, a commuter authority apparently was required to comply with the labor transfer provisions of the bill only if it elected to make use of the Act's property and service transfer provisions. Section 403 of S. 1100 (which was the predecessor of § 508 of NRSA) provided, "*If* Conrail or Amtrak enters into an agreement for the transfer of commuter service responsibilities to a commuter authority under title II of this Act" (emphasis added) then labor transfer negotiations are required. By its very terms—"*If*" an agreement is entered into under title II—the labor transfer provision was conditioned upon what occurred under title II. But § 202(a) of title II provided that "[a] commuter authority . . . *may* initiate negotiations with Conrail for the transfer of commuter services operated by Conrail" (emphasis added). Apparently, under this section as it stood in S. 1100, it was up to the commuter authority to decide whether or not an agreement would be entered into under title II. The only other commuter service transfer provision in "title II of the Act" is § 202(d), which deals with transfers from Amtrak to a commuter authority, and which provides, "[f]ollowing the transfer of commuter services and properties to Amtrak and *upon the request* of the commuter authority . . . , Amtrak and the commuter authority shall agree upon terms and conditions for the transfer . . . ." (Emphasis added.) Again, there is little basis for arguing that a commuter authority *must* make a request for a commuter service transfer. In short, under title II of S. 1100 commuter authorities apparently were free to seek, or not to seek, property and service transfers from Conrail and Amtrak, and the Act's labor transfer provision, § 403, was linked to the decision of a commuter authority to seek a property transfer under title II. SEPTA's argument that the labor transfer provi-

sions of NRSA are permissive would have found strong support in the language of S. 1100.

The Senate bill which superseded S. 1100—the Senate version of the Omnibus Bill, S. 1377—made significant changes in S. 1100. Section 412-7 of S. 1377 introduced an entirely new provision, which said:

> Not later than 90 days after the date of enactment of this part, each commuter authority shall notify the Secretary and Conrail whether it intends to operate its own commuter service or to contract with Amtrak Commuter for the operation of such service.[15]

This language was inserted at the beginning of what was, in S. 1377, § 412-8, and ultimately became § 506(a) of NRSA. The new provision, which, like § 508(a), contains the mandatory "shall", introduced a new, nonpermissive element into the statutory framework. As the Senate report accompanying S. 1377 described the new language: "[t]he section *requires* that a commuter authority notify the Secretary and Conrail not later than 90 days after enactment if it intends to assume direct control of its commuter operations or if it intends to contract with Amtrak Commuter." S. Rep. No. 139, 97th Cong., 1st Sess. 326 (1981) (emphasis added).

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15. There was no equivalent of the notification requirement of § 506(a) in the earliest versions of the act. The present § 506 is based on § 202 of the original Senate bill, S. 1100. Compare § 202(a), (b), (c) and (d) with § 506(b), (c), (d) and (e).

Similarly, neither the original House bill, H. R. 3559, nor the rail service provisions of the House version of the Omnibus Bill, H. R. 3982, contained an equivalent of § 506: the House bills apparently did not envision any direct transfer of Conrail properties to commuter authorities as distinguished from Amtrak Commuter. See H. R. 3559, § 202 (which would have added §§ 501-505 to the Rail Passenger Service Act).

At the same time that the forerunner of § 506(a) was added to S. 1377, the predecessor of § 508(a) also made its debut. While the labor transfer provisions of § 403(a) of S. 1100 were linked to the property and service transfer provisions of that version of the bill, see pp. 22-23, *supra*, in S. 1377 this linkage was removed. Whereas § 403(a) of S. 1100 provided for labor negotiations "*[i]f* Conrail or Amtrak enter[ed] into an agreement for the transfer of commuter service responsibilities under title II . . ." , (emphasis added) the new labor transfer provision, § 414-1(a) of S. 1377, provided, "[w]ithin 120 days after the date of enactment of this part, Conrail, commuter authorities that intend to operate commuter service, and representatives of the various crafts or classes [of] employees of Conrail to be transferred to the commuter authorities *shall* enter into . . . negotiations" (emphasis added). This new provision was accepted by the conferees and is now § 508(a) of NRSA.[16]

16. We also note that even under S. 1100, which would have provided SEPTA with an argument considerably more persuasive than the version finally passed, SEPTA's representatives indicated a belief that the labor provisions were mandatory. David F. Girard-diCarlo, SEPTA's Chairman, testified to a Senate subcommittee that:

> There is one other issue that is of particular concern to SEPTA, and that is that we, with some minor adjustments to our service, could operate totally intrastate. If we did that and we took over the service, the employees would be public employees governed by act 195 of the Commonwealth of Pennsylvania.
>
> I would suggest to you, Senators, that your legislation does not seem to provide us the mechanism to operate under local State law and that the present legislation indeed might be unconstitutionally in violation of the 10th amendment as an unlawful intrusion by the Federal Government on the sovereignty of the States.

Northeast Rail Service Act of 1981, Hearing Before the Subcommittee on Surface Transportation of the Senate Committee on

Despite the absence of specific language in the legislative history saying that S. 1377 was intended to remove the linkage in S. 1100 between the permissive property transfer provisions and the labor transfer provisions, the legislative developments described above strongly suggest that this was what was intended. It appeared on the face of § 403 of S. 1100 that the property and labor transfer provisions were linked, and that a commuter authority could bypass the labor transfer negotiations by foregoing a transfer of property from Conrail.[17] When it accepted S. 1377, however, Congress entirely deleted the language that accomplished this result. In its place, Congress substituted language which not only did not contain the linkage that § 403 had, but added a new phrase that had every appearance of being mandatory: "commuter authorities that intend to operate commuter service . . . shall enter into negotiations." The mandatory character of the addition was made even clearer by the report accompanying S. 1377, which described the new section in the following terms: "Subsections (a) and (b) [of § 414-1] *require* Amtrak Commuter or the commuter authorities, whichever is applicable . . . to enter into implementing agreements within

16. (Cont'd.)

Commerce, Science, and Transportation, 97th Cong., 1st Sess. 27 (June 17, 1981). On the same day that Mr. Girard-diCarlo testified, S. 1377 was introduced. The new bill deleted the language of S. 1100 that would have aided SEPTA's argument that the Act was permissive, and substituted what is now the mandatory phrasing of §§ 506(a) and 508(a), see *supra*.

17. A similar result apparently would have obtained under the House bills, H. R. 3559 and H. R. 3964. Both bills ignored the possibility of transfers of labor or property to commuter authorities. H. R. 3559, § 401 (adding § 506 to the Rail Passenger Service Act); H. R. 3964, § 6461 (adding § 506 to the Rail Passenger Service Act), *reprinted in* 127 Cong. Rec. H3616 (June 26, 1981).

21 [sic] days after enactment of the Act." S. Rep. No. 139, 97th Cong., 1st Sess. 336 (1981) (emphasis added). The language that this portion of the Senate Report refers to now appears, with only technical changes, in § 508(a) of NRSA.

Finally, the conferees seem to have thought they had provided a complete solution to the transfer of labor and property from Conrail to commuter authorities and Amtrak Commuter.[18] They said in the Explanatory Statement, p. 58:

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18. SEPTA also suggests that RLEA's interpretation of § 508 (a) leads to anomalous results. As noted above, NRSA specifically envisions that commuter authorities may contract with entities other than Amtrak Commuter for the provision of commuter services. See § 504(g); p. 21, *supra*. SEPTA argues that since a third party contract operator would have had no previous relations with Conrail, Congress could not reasonably have expected it to take over Conrail employees and that nothing in § 508 in terms requires such a contract operator to negotiate with Conrail labor representatives. At argument counsel for RLEA sought to counter this by pointing to the definition of "commuter authority" in § 1135(a) as including "any entity created by one or more such agencies for the purpose of operating, or contracting for the operation of commuter service," and arguing that this included third party contractors. Counsel for SEPTA effectively responded that this refers only to a subsidiary created by a commuter authority, not to an independent contractor engaged by an authority or the subsidiary.

Based on the above observation, SEPTA argues that if it wishes to operate its own commuter service it should stand in no worse position than a contractor whom it hires. We are not certain what the ultimate decision with respect to the independent contractor should be. On January 11, 1982, we denied, without prejudice to renewal, on the ground that the issue was not ripe for decision, a motion by RLEA to file a second amended complaint that would have raised that question. However, even if we assume *arguendo* that § 508(a) is not applicable to a contractor, at least when no transfer of Conrail property is required,

> The implementing agreement provided for in new section 508 of the Rail Passenger Service Act is designed to provide for an orderly transfer of employees from Conrail to Amtrak Commuter or the commuter authorities.

This concern with an "orderly transfer" would be difficult to square with SEPTA's interpretation of the statutory scheme wherein commuter authorities which own their tracks and rolling stock, see note 8, *supra*, are left entirely free to ignore the procedures provided by Congress. With commuter authorities having proclaimed their desire to be free of uneconomic work rules and the need to bargain with the railway craft unions,[19] it would be unlikely for

18. (Cont'd.)
Congress may have had reasons to treat commuter authorities that operate their own services differently from those that contract with third parties. The fact that Congress may have left an escape hatch in the contracting out situation, whether deliberately or through inadvertence, an issue we do not decide, does not prove that it meant to allow a larger one.

19. The NECCRAC Report on Conrail Labor Issues, which was known to Congress, see Northeast Rail Service Act of 1981, Hearing Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, Science, and Transportation, 97th Cong., 1st Sess. 14, 76-92 (1981) (including reprint of NECCRAC report), devoted 15 pages, pp. 15-29, to demonstrating the adverse impact of outdated labor rules on productivity and costs. The report pointed to an analysis made by Conrail showing that annual savings from work rule changes proposed by NECCRAC would amount to $9.4 million for SEPTA, $19.9 million for New Jersey Transit, and $16.5 million for MTA-CDOT (p. 28). The report proposed that Congress should give the commuter authorities one of two alternatives, p. 35:

> 1. Give the individual commuter rail authorities the ability to operate the service directly under state labor laws.
>
> 2. Retain the National Railway Labor Act as the governing law, but amend it to:

commuter authorities to make use of the statutory framework unless the labor transfer provisions are mandatory.[20] Consequently, NRSA's complex labor transfer provisions might well be largely ignored—a result we do not think Congress intended.

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19. (Cont'd.)

a. require Conrail's successor and the labor organizations to renegotiate the current contract upon takeover; and

b. establish a final and binding process to resolve the long-festering issues relating to work rules and bases of pay.

Congress did neither.

20. One can indeed think of reasons why a commuter authority might wish to negotiate an implementing agreement. Commuter authorities might have viewed labor transfer negotiations as a way to assure access to skilled Conrail commuter employees. See the testimony of Louis Gambaccini, Commissioner of Transportation for the State of New Jersey, before House Subcommittee on Commerce, Transportation, and Tourism, at pp. 35-37, and before the Senate Subcommittee on Surface Transportation of the Committee on Commerce, Science, and Transportation, 97th Cong., 1st Sess., at p. 108 (1981). However, under § 508 Conrail employees are not required to accept work with a commuter authority, see § 508(c)(3), and even those employees that do accept such employment will be permitted to return to Conrail with their previous seniority, see § 508(c)(7). Again § 506(g) provides that the transfer of "fixed facilities and rolling stock" from Conrail to commuter authorities under § 506 shall be without consideration. However, as explained at pp. 22-25, *supra*, and as conceded by SEPTA, Transcript of Oral Argument at 43-44, NRSA as enacted contains no linkage between its property and labor transfer provisions. Moreover, even if there was such linkage, it appears that commuter authorities already own much of the property needed to operate commuter service, see note 8, *supra*. Also the Secretary of Transportation probably would not allocate any of the $50,000,000 which § 601(b) of the Rail Passenger Service Act, added by § 1139 of NRSA, authorizes for appropriation "to facilitate the transfer of rail commuter services from Conrail to other operators" to a commuter authority which had not executed an implementing

Although, in the light of the closeness of the question and the seriousness of the consequences of our decision, we have deemed it proper to dissect the statute and the legislative history in what may seem tiresome detail, our principal reason for reading §§ 508 and 510 as applicable to a commuter authority which desires to operate commuter service that was operated for it by Conrail on the effective date of Subtitle E is that to uphold SEPTA's contrary argument would defy the basic purpose of the amendments made by §§ 1136-39 and 1143 of NRSA. Broadly speaking these provisions were an affirmative answer to chapter 9 (entitled "Passenger Service") of Conrail's Response (entitled "Options for Conrail") to Section 703(c) of the Staggers Rail Act of 1980. In that response Conrail had asserted, apparently convincingly, that, despite state and local subsidization, commuter services were a serious drain on its resources (p. 9-9). It had also engaged in an elaborate discussion, somewhat similar to that in its brief here, of the adverse economic consequence of any method of relieving it of its commuter service obligations that did not also provide continued employment in that service of the employees who had been rendering it (p. 9-21). Congress did not go to the full extent sought by Conrail on that point. In § 508 it left the determination of what Conrail employees would go with the service in the first instance to the agreement of the parties and, if that proved unattainable, to a referee. In a section showing extraordinary deference to the wishes of the railway unions, it even preserved the rights of

20. (Cont'd.)
agreement. Without saying that these incentives might not operate in same cases, we think that in most they would not overcome the desire of commuter authorities to get away from the burden of taking on Conrail employees and their representatives if they were free to do so, see note 19, *supra*.

transferred Conrail employees to exercise previous freight seniority rights, § 508(c)(7), although this would entail evils of the very sort feared by Conrail,[21] and provided that any employee not transferred should be given employee protection under the Government financed plan established under the new § 701 of RRRA "to the same extent as if such employee had remained in the employ of Conrail", § 508(f). The timetables in the labor provision are carefully constructed so that determination of the Conrail employees to be transferred and the collective bargaining agreements will all be in place by January 1, 1983, when commuter services must be transferred and Conrail is to be relieved of its responsibilities for such service. We cannot readily attribute to Congress an intention to leave a gaping hole in this carefully articulated structure which would permit SEPTA (at least with respect to operations where it owned the track and rolling stock and intended itself to operate the service) and other similarly situated commuter authorities to cause a massive displacement of Conrail employees.

There is an obvious appeal in SEPTA's basic position that if it is willing to take on the thankless job of furnishing commuter passenger rail service, it should be entitled to make a fresh start, with labor agreements negotiated in accordance with Pennsylvania's Public Employee Relations Act rather than being obliged to take, even if only as a point of reference, agreements with railway craft unions which are the successors of decade old agreements negotiated by Conrail's predecessors under the Railway Labor Act. Some of SEPTA's detailed arguments also have force, as our discussion has shown. Yet, when all this has been said, to uphold

21. The evil was lessened but not wholly eliminated by the provision that Conrail was entitled to furlough one employee for each employee exercising such rights.

SEPTA's position would be to defy Justice Holmes' admonition in *Johnson v. United States,* 163 F. 30, 32 (1 Cir. 1908).

> The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.

It would surely have been possible for Congress to have expressed what we think to have been its intention far more clearly, as, to take one method out of many, by saying: "No commuter authority shall undertake commuter service which Conrail was rendering to it under contract on the effective date of this Act unless", etc. But laws enacted by Congress "are not to be read as though every *i* has to be dotted and every *t* crossed." *United States ex. rel. Knauff v. Shaughnessy,* 338 U.S. 537, 548-49 (1950) (Frankfurter, J., dissenting). While "the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing . . . it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary[,] but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell v. Markham,* 148 F.2d 737, 739 (2 Cir.) (L. Hand, J.), *aff'd,* 326 U.S. 404 (1945).

We have considered whether, despite all this, because of the substantial argument that the construction of

the statute urged by RLEA and Conrail might cause it to be unconstitutional under *National League of Cities, supra,* 426 U.S. 833, (although we decide that question also against SEPTA, see *infra*), we should adopt SEPTA's reading under the principle of construing an ambiguous statute to avoid constitutional doubts. See *Blodgett v. Holden,* 275 U.S. 142, 148 (1927) (Holmes, J., concurring); *Richmond Screw Anchor Co. v. United States,* 275 U.S. 331, 346 (1928); *Ashwander v. TVA,* 297 U.S. 288, 341 (1936) (Brandeis, J., concurring); *Lucas v. Alexander,* 279 U.S. 573, 577 (1929); *Crowell v. Benson,* 285 U.S. 22, 62 (1932). But in the end we are confident that the statute means what RLEA and Conrail say. Despite awkward draftsmanship and unexplained gaps, notably the possible one of the contracting out situation, Congress left no real doubt that a commuter authority which was employing Conrail to render commuter service on the effective date of Subtitle E could not operate that service on its own account or have Amtrak Commuter operate the service for it under adequate payment without propelling itself down the path described in §§ 508 and 510. Having firmly arrived at that conclusion we see no justification for giving the statute a different interpretation in order to avoid a constitutional doubt which, although real, we consider ultimately to be unfounded.

It remains to consider the special problems of the Fox Chase-Newtown service. SEPTA argues that, whatever our conclusion on its broader plan may be, it had no obligation with respect to the Fox Chase-Newtown segment since this was not in operation on the effective date of the Act, August 13, 1981. RLEA answers that although the Operating Agreement between Conrail and SEPTA had expired on March 31, 1978, this was continued pending negotiations by § 7.03(d) and that, by virtue of Conrail's August 20 acceptance of SEPTA's offer of August 11, the

agreement was extended until December 31, 1981. In their view it follows that when the Fox Chase-Newtown line was repaired, legal responsibility for resuming operation was in Conrail, not SEPTA.

What this argument overlooks is that, some months before the effective date of the Act, SEPTA had made clear to Conrail that it would not continue to subsidize RDC service. When the Fox Chase-Newtown service was closed down on July 1, 1981, this was therefore not an ordinary closing for repair. It was a closing with a definite understanding that when and if Conrail and SEPTA negotiated new terms, these would not include any SEPTA financing for RDC service or, in consequence, any obligation of Conrail to furnish it. On the effective date of NRSA, Conrail thus had not even a contingent responsibility for the Fox Chase-Newtown service. SEPTA thus did not violate §§ 508 or 510 in beginning service on its own account without going through the procedures required by those sections.

IV. Constitutionality

SEPTA contends that forcing it to comply with §§ 508 and 510 would contravene the principle announced in *National League of Cities v. Usery, supra*, 426 U.S. 833. That case established that, despite the breadth of the commerce power,[22] there are limits to its exercise upon "the

22. We do not understand SEPTA to claim that §§ 508 and 510 would lie beyond the commerce power even when SEPTA discontinues operations to New Jersey and Delaware. SEPTA's commuter services within Pennsylvania clearly affect commerce. We can take notice that these require fuel and other supplies coming from outside the state and that many of the commuters are employed by enterprises engaged in interstate or foreign commerce. See *United States v. Darby*, 312 U. S. 100, 113-18 (1941); *Wickard v. Filburn*, 317 U. S. 111 (1942); *Heart of Atlanta Motel, Inc. v. United States*, 379 U. S. 241 (1964). Still more important, Subtitle E amends the Rail Passenger Service

States as States." 426 U.S. at 845. The specific holding was that the 1974 amendment extending the Fair Labor Standards Act to any "public agency" was unconstitutional insofar as it operated "to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions". 426 U.S. at 852. At the same time the Court overruled *Maryland v. Wirtz*, 392 U.S. 183 (1968), which had upheld the validity of an earlier amendment extending the Fair Labor Standards Act to employees of state hospitals, institutions and schools. Justice Blackmun, whose vote was necessary to make up the majority in *National League of Cities*, joined on the basis of an interpretation that the opinion "adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential", 426 U.S. at 856; see also 426 U.S. at 852-53 (majority opinion) (distinguishing wage freeze in *Fry v. United States*, 421 U.S. 542 (1975), because of the emergency threatening all component parts of the federal system and the minimal intrusion on state sovereignty).

In *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 101 S. Ct. 2352, 2365-66 & n.29 (1981), the Court revisited *National League of Cities*, saying that

> in order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three

22. (Cont'd.)

Act, the first in a series of measures enacted over the past 12 years, in which Congress has grappled with the overall problem of maintaining railroad service in the northeastern states and railroad passenger service generally; these statutes have drawn on both the bankruptcy and the commerce powers, see *In re Penn Central Transportation Co., 180 Day Appeals*, 384 F. Supp. 895, 915-16 (Sp. Ct. RRRA 1974).

requirements. First, there must be a showing that the challenged statute regulates the "States as States." *Id.*, at 854. Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." *Id.*, at 854. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions." *Id.*, at 852.[29]

29. Demonstrating that these three requirements are met does not, however, guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies State submission. See *Fry v. United States*, 421 U. S. 542 (1975), reaffirmed in *National League of Cities v. Usery, supra*, at 852-853 (197[6]). See also *id.* at 856 (Blackmun, J., concurring). (Emphasis in original; parallel citations omitted.)

RLEA and the United States as *amicus* contend that the inapplicability of *National League of Cities* is conclusively established by Justice Rehnquist's statement, 426 U.S. at 854-55 & n.18, that the holding—as opposed to certain language—in the opinion in *United States v. California*, 297 U.S. 175 (1936), as well as the holdings in *California v. Taylor*, 353 U.S. 553 (1957), and *Parden v. Terminal Ry. of the Alabama State Docks Department*, 377 U.S. 184 (1964), remained unaffected. The question cannot be so easily answered, for the facts of those cases differ significantly from those before us. Those cases upheld application of the Safety Appliance Act, the Railway Labor Act and the Federal Employers' Liability Act to state-owned and operated terminal railroads which interchanged with privately owned carriers freight traffic moving in interstate and foreign commerce. Although they operated wholly within the state, their activities were at the core of

the commerce clause—the transportation of goods originating or terminating outside the state. While the railroads involved in the three cases were not intended to make a profit after debt service, they were likewise not intended to operate at a loss, nor was there anything to indicate they had done so. Even more important, while publicly owned freight terminal railroads were not at all unknown, most freight terminal railroads were privately owned and operated, see *In the Matter of the Valuation Proceedings under Sections 303(c) and 306 of the Regional Rail Reorganization Act of 1973, Rail Use Opinion*, Sp. Ct. Rep. N 38196, N 38399 & n.217 (1981). There was no evidence of the same general sense of state or local government responsibility for freight service, even within terminal areas, that has been developing with respect to urban passenger service within the last several years.

Against these cases, SEPTA relies heavily on *United Transportation Union v. Long Island R.R. Co.*, 634 F.2d 19 (2 Cir. 1980), *cert. granted*, 101 S. Ct. 3107 (1981), in which the court held that application of the Railway Labor Act to the state-owned Long Island Rail Road in such a way as to dislodge New York's antistrike law for public employees violated *National League of Cities*. That case was, in one way, a weaker one for the application of the tenth amendment limitation than this case, for the Long Island was engaged in a limited freight business as well as its larger passenger operations. But in another respect, New York's interest in enforcement of its antistrike law may have been stronger than any of Pennsylvania's interests here, since the Pennsylvania Public Employees Relations Act does not forbid a strike after prescribed procedures have been exhausted. Thus, the *Long Island* case presented an extremely close question, and we are hesitant to rely on it for guidance, particularly when there is an alternative ground for decision available.

SEPTA also relies on a number of other cases in lower federal courts, notably *Amersbach v. City of Cleveland*, 598 F.2d 1033 (6 Cir. 1979), which held the operation of a municipal airport to be a traditional and integral governmental function, and a number of district court decisions holding that under *National League of Cities* the Fair Labor Standards Act could not constitutionally be applied to local transit systems.[23] In each of these cases, the courts have struggled with the problem of applying the amorphous standards of "integral" and "traditional"—a problem that rivals the question encountered some decades ago in attempting to draw the line between governmental and proprietary activities of local governments for the purpose of determining the scope of sovereign immunity. Prosser, Law of Torts 479-82 (4th ed. 1971). These prior cases do not dictate a result in favor of either party.

We likewise do not find decisive the Government's argument that NRSA imposes a procedural regime on the state and does not displace the state's substantive decisions. The Supreme Court in *National League of Cities* did distinguish the imposition of a wage freeze on state employers, *Fry v. United States*, *supra*, 421 U.S. 542, on the ground that it did not displace state decisions but only required the maintenance of state decisions for a limited time. 426 U.S. at 853. This case is clearly weaker than *Fry* for the application of that distinction, for SEPTA is not merely required to maintain its past decisions on employee relations; rather, it is required to adopt a new method of making decisions. We see some force to the contention that such a requirement entails a greater in-

23. We were advised that in one of these, *San Antonio Metropolitan Transit Authority v. Donovan*, No. SA-79-CA-457 (W. D. Tex. Nov. 17, 1981), the Government has taken a direct appeal to the Supreme Court under 28 U. S. C. § 1252.

trusion on state sovereignty than a wage freeze. Again, we think that the question is a close one and prefer to leave it, as well as the further definition of "integral" and "traditional", to the Supreme Court to decide in the *Long Island* case.[24]

We need not attempt to answer these questions, for this case is controlled by the important interests of the federal government that are at stake. See *Hodel, supra*, 101 S. Ct. at 2366 n.29, quoted at pp. 32-33, *supra*. We are not dealing here with an across the board statute like the Fair Labor Standards Act in which the federal government's interest in wages and hours of state and local employees was simply the same interest that it had in regulating all other employees engaged in or producing goods for commerce. The instant controversy arises in the context of an intensive federal effort to preserve both passenger and freight rail transportation in the northeastern states and passenger service throughout the nation —an effort which has cost billions of dollars of federal funds and from which Pennsylvania has derived great benefits. The Government's interests in minimizing future costs for Conrail and itself and in seeking to preserve labor peace and employee morale clearly transcend Pennsylvania's interest in having SEPTA free from what is ultimately an arbitral process to determine how its initial employment complement should be set and from bargaining under the Railway Labor Act rather than Pennsylvania's Public Employees Law. We therefore reject SEPTA's contentions based on *National League of Cities*.[25]

24. The *Long Island* case will doubtless be decided before the end of the Supreme Court's current Term, and we stand ready to consider the *National League of Cities* question again if its opinion should give occasion for doing so.

25. In the light of this disposition, we deny the January 13, 1982 "Motion of the United States as *Amicus Curiae* for Leave to File Supplemental Brief".

The parties shall endeavor to agree on a judgment granting and denying declaratory and injunctive relief in conformity with this opinion. The judgment shall not include any provision for costs. If they are unable to agree on a form of judgment within fourteen days from the filing of this opinion, judgment shall be settled on five days notice.

/s/ HENRY J. FRIENDLY BY RCT
Henry J. Friendly
Presiding Judge

/s/ JOHN MINOR WISDOM BY RCT
John Minor Wisdom
Judge

/s/ ROSZEL C. THOMSEN
Roszel C. Thomsen
Judge

DATED: January 27, 1982

APPENDIX B

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973

CIVIL ACTION NO. 81-8

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Plaintiff,

v.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,
Defendant,

and

CONSOLIDATED RAIL CORPORATION,
Rule 19 Party.

JUDGMENT

[Filed March 11, 1982]

NOW, this 9th day of March, 1982, it is hereby ORDERED AND DECREED as follows:

1. Prior to January 1, 1983, the Southeastern Pennsylvania Transportation Authority ("SEPTA") may not lawfully commence the direct operation of any "commuter service", as defined in § 1185(b) of the Northeast Rail Service Act of 1981 ("NRSA"), on any rail line upon which Conrail was providing service for SEPTA on the effective date of NRSA, August 13, 1981, without having previously completed the negotiation and arbitration procedure set

forth in §§ 508 and 510 of the Rail Service Passenger Act as amended by § 1145 of NRSA. The court retains jurisdiction with respect to the obligations of SEPTA after January 1, 1983.

2. Sections 508 and 510 of NRSA are not applicable to SEPTA's operation of commuter rail service on the Fox Chase-Newtown line and SEPTA is free to operate commuter rail service on that line without compliance with these sections.

3. The Railway Labor Executives' Association's requests for injunctive relief, an award of back pay, and costs and attorneys' fees are denied.

/s/ HENRY J. FRIENDLY
Henry J. Friendly
Presiding Judge

/s/ JOHN MINOR WISDOM
John Minor Wisdom
Judge

/s/ ROSZEL C. THOMSEN
Roszel C. Thomsen
Judge

APPENDIX C

Text of Constitutional and Statutory Provisions Involved

1. U. S. Const. Amend. X:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

2. Northeast Rail Service Act of 1981, Subtitle E of Title XI of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1136, 95 Stat. 357:

> "Notwithstanding any other provision of law or contract, Conrail shall be relieved of any legal obligation to operate commuter service on January 1, 1983."

3. Northeast Rail Service Act of 1981, Subtitle E of Title XI of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1152, 95 Stat. 357:

> "(a) Notwithstanding any other provision of law, the special court shall have original and exclusive jurisdiction over any civil action—
>
> (1) for injunctive, declaratory, or other relief relating to the enforcement, operation, execution, or interpretation of any provision of or amendment made by this subtitle, or administrative action taken thereunder to the extent such action is subject to judicial review;
>
> (2) challenging the constitutionality of any provision of or amendment made by this subtitle;

(3) to obtain, inspect, copy, or review any document in the possession or control of the Secretary, Conrail, the United States Railway Association, or Amtrak that would be discoverable in litigation under any provision of or amendment made by this subtitle; or

(4) seeking judgment upon any claim against the United States founded upon the Constitution and resulting from the operation of any provision of or amendment made by this subtitle.

(b) A judgment of the special court in any action referred to in this section shall be reviewable only upon petition for a writ of certiorari to the Supreme Court of the United States, except that any order or judgment enjoining the enforcement, or declaring or determining the unconstitutionality or invalidity, of any provision of this subtitle shall be reviewable by direct appeal to the Supreme Court of the United States. Such review is exclusive and any petition or appeal shall be filed not more than 20 days after entry of such order or judgment.

(c) Administrative action under the provisions of or amendments made by this subtitle which is subject to review shall be upheld unless such action is found to be unlawful under standards established for review of informal agency action under paragraphs (2)(A), (B), (C), and (D) of section 706, title 5, United States Code. The requirements of this subtitle shall constitute the exclusive procedures required by law for such administrative action.

(d) If the volume of civil actions under subsection (a) of this section so requires, the United States Railway Association shall apply to the judicial panel on multi-district litigation authorized by section 1407 of title 28, United States Code, for the assignment of additional judges to the special court. Within 30 days after the date of such application, the panel shall assign to the special court such additional judges as may be necessary to exercise the jurisdiction described in subsection (a) of this section."

4. Rail Passenger Service Act § 508, as added by the Northeast Rail Service Act of 1981, Subtitle E of Title XI of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1145, 95 Stat. 357:

"(a) Not later than May 1, 1981, Conrail, commuter authorities that intend to operate commuter service, and representatives of the various crafts or classes of employees of Conrail to be transferred to the commuter authorities shall enter into negotiations for an implementing agreement in accordance with subsection (c) of this section.

(b) Not later than May 1, 1981, Conrail, Amtrak Commuter, and representatives of the various crafts or classes of employees of Conrail to be transferred to Amtrak Commuter shall enter into negotiations for an implementing agreement in accordance with subsection (c) of this section.

(c) Such negotiations shall—

(1) determine the number of employees to be transferred to Amtrak Commuter or a commuter authority;

(2) identify the specific employees of Conrail to whom Amtrak Commuter or a commuter authority offers employment;

(3) determine the procedure by which such employees may elect to accept employment with Amtrak Commuter or a commuter authority;

(4) determine the procedure for acceptance of such employees into employment with Amtrak Commuter or a commuter authority;

(5) determine the procedure for determining the seniority of such employees in their respective crafts or classes in Amtrak Commuter or with a commuter authority which shall, to the extent possible, preserve their prior seniority rights;

(6) ensure that all such employees are transferred to Amtrak Commuter or a commuter authority no later than January 1, 1983; and

(7) ensure the retention of prior seniority on Conrail of employees transferring to Amtrak Commuter or a commuter authority and determine the extent and manner in which such employees shall be permitted to exercise such seniority in order to (A) provide employees transferred to Amtrak Commuter or a commuter authority at least one opportunity every six-month period to exercise previous freight seniority rights, (B) maximize employment opportunities for employees on furlough, (C) maintain the ability to recall experienced employees, (D) ensure

that under no circumstances are seniority rights exercised in any manner which results in any disruption of service or a position being filled which would otherwise not be filled under the terms of any crew consist, fireman manning, or other similar agreement, and (E) ensure that Conrail has the right to furlough one employee in the same craft or class for each employee who returns from Amtrak Commuter or a commuter authority by exercising seniority.

(d)(1) If agreements with respect to the matters being negotiated pursuant to this section are not reached by August 1, 1982, the parties to the negotiations shall, within an additional 5 days, select a neutral referee. If the parties are unable to agree upon the selection of such a referee, the National Mediation Board shall immediately appoint a referee.

(2) The referee shall commence hearings on the matters being negotiated pursuant to this section not later than 5 days after the date he is selected or appointed, and shall render a decision within 20 days after the date of commencement of such hearings. All parties may participate in the hearings, but the referee shall have the only vote.

(3) The referee shall resolve and decide all matters in dispute with respect to the negotiation of the implementing agreement or agreements. The referee's decision shall be final and binding to the same extent as an award of an adjustment board under section 3 of the Railway Labor Act, and shall con-

stitute the implementing agreement or agreements between the parties. The National Mediation Board shall fix and pay the compensation of such referees.

(e) If Amtrak Commuter transfers commuter service and properties to a commuter authority under section 506 of this title, Amtrak Commuter, the commuter authority, and representatives of the various crafts or classes of employees to be transferred to the commuter authority shall enter into an implementing agreement in accordance with subsection (c) of this section. If no agreement is reached by the date service and properties are transferred, the dispute shall be resolved by a neutral referee in accordance with subsection (d) of this section.

(f) Any employee of Conrail who is not offered employment with Amtrak Commuter or a commuter authority under agreements entered into under this section shall be provided employee protection under section 701 of the Regional Rail Reorganization Act of 1973 to the same extent as if such employee had remained in the employ of Conrail."

5. Rail Passenger Service Act § 510, as added by the Northeast Rail Service Act of 1981, Subtitle E of Title XI of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1145, 95 Stat. 357:

"(a)(1) Not later than September 1, 1982, the commuter authorities that intend to operate commuter service and the representatives of the various classes or crafts of employees to be transferred to such commuter authorities

under agreements entered into under section 508 of this Act shall enter into new collective bargaining agreements with respect to rates of pay, rules, and working conditions.

(2) Not later than September 1, 1982, Amtrak Commuter and the representatives of the various classes or crafts of employees to be transferred to Amtrak Commuter under agreements entered into under section 508 of this Act shall enter into new collective bargaining agreements with respect to rates of pay, rules, and working conditions.

(b) If the parties have not reached an agreement by the date specified in subsection (a) of this section, any party to the dispute or the Governor of any State through which the service that is the subject of the dispute is operated may, within 15 days after such date, request the President to establish an emergency board pursuant to subsection (c) of this section.

(c) Within 15 days after the request under subsection (b) of this section, of a party or a Governor, the President shall create an emergency board. Such board shall conduct a public hearing on the dispute at which each party shall appear and provide testimony, and shall, within 30 days after the date of its creation, report on the dispute.

(d) If no settlement in the dispute is reached within 10 days after the report of the emergency board, such board shall require the parties to the dispute to submit, within 15 days, final offers to the board for settlement of the dispute.

(e) Within 15 days after the submission of final offers, the emergency board shall submit a report to the President setting forth its selection of the most reasonable offer.

(f) If the emergency board selects a final offer submitted by a carrier and the employees of such carrier engage in any work stoppage arising out of the dispute, such employees shall not be eligible during the period of such work stoppage for benefits under the Railroad Unemployment Insurance Act.

(g) If the emergency board selects a final offer submitted by the employees and the carrier refuses to accept such offer, the carrier shall not participate in any benefits of any agreement between carriers which is designed to provide benefits to such carriers during a work stoppage.

(h) The provisions set forth in this section shall be the exclusive means for resolving any dispute relating to entering into an initial collective bargaining agreement between Amtrak Commuter or a commuter authority, as the case may be, and representatives of the various classes or crafts of employees to be transferred to Amtrak Commuter or such commuter authority."

6. Railway Labor Act § 9A, as added by the Northeast Rail Service Act of 1981, Subtitle E of Title XI of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1157, 95 Stat. 357:

"The Railway Labor Act is amended by inserting immediately after section 9 the following new section:

"SPECIAL PROCEDURE FOR COMMUTER SERVICE

"Sec. 9A. (a) Except as provided in Section 510(b) of the Rail Passenger Service Act, the provisions of this section shall apply to any dispute subject to this Act between a publicly funded and publicly operated carrier providing rail commuter service (including the Amtrak Commuter Services Corporation) and its employees.

"(b) If a dispute between the parties described in subsection (a) is not adjusted under the foregoing provisions of this Act and the President does not, under section 10 of this Act, create an emergency board to investigate and report on such dispute, then any party to the dispute or the Governor of any State through which the service that is the subject of the dispute is operated may request the President to establish such an emergency board.

"(c)(1) Upon the request of a party or a Governor under subsection (b), the President shall create an emergency board to investigate and report on the dispute in accordance with section 10 of this Act. For purposes of this subsection, the period during which no change, except by agreement, shall be made by the parties in the conditions out of which the dispute arose shall be 120 days from the date of the creation of such emergency board.

"(2) If the President, in his discretion, creates a board to investigate and report on a dispute between the parties described in subsection (a), the provisions of this section shall apply to the same extent as if such board had

been created pursuant to paragraph (1) of this subsection.

"(d) Within 60 days after the creation of an emergency board under this section, if there has been no settlement between the parties, the National Mediation Board shall conduct a public hearing on the dispute at which each party shall appear and provide testimony setting forth the reasons it has not accepted the recommendations of the emergency board for settlement of the dispute.

"(e) If no settlement in the dispute is reached at the end of the 120-day period beginning on the date of the creation of the emergency board, any party to the dispute or the Governor of any State through which the service that is the subject of the dispute is operated may request the President to establish another emergency board, in which case the President shall establish such emergency board.

"(f) Within 30 days after creation of a board under subsection (e), the parties to the dispute shall submit to the board final offers for settlement of the dispute.

"(g) Within 30 days after the submission of final offers under subsection (f), the emergency board shall submit a report to the President setting forth its selection of the most reasonable offer.

"(h) From the time a request to establish a board is made under subsection (e) until 60 days after such board makes its report under subsection (g), no change, except by agreement,

shall be made by the parties in the conditions out of which the dispute arose.

"(i) If the emergency board selects the final offer submitted by the carrier and, after the expiration of the 60-day period described in subsection (h), the employees of such carrier engage in any work stoppage arising out of the dispute, such employees shall not be eligible during the period of such work stoppage for benefits under the Railroad Unemployment Insurance Act.

"(j) If the emergency board selects the final offer submitted by the employees and, after the expiration of the 60-day period described in subsection (h), the carrier refuses to accept the final offer submitted by the employees and the employees of such carrier engage in any work stoppage arising out of the dispute, the carrier shall not participate in any benefits of any agreement between carriers which is designed to provide benefits to such carriers during a work stoppage."

Supplemental Brief

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No. 81-1807

IN THE

Supreme Court of the United States

October Term, 1981

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,

and

CONSOLIDATED RAIL CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the Special Court, Regional Rail Reorganization Act of 1973

SUPPLEMENTAL BRIEF

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Supreme Court Rule 22.6 2

No. 81-1807

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,
Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
and
CONSOLIDATED RAIL CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT OF 1973

SUPPLEMENTAL BRIEF

I. INTRODUCTION

On March 29, 1982, the Southeastern Pennsylvania Transportation Authority (hereinafter "SEPTA") filed with this Court a Petition for a Writ of Certiorari to the Special Court, Regional Rail Reorganization Act of 1973. After the petition had been printed, the Court announced its decision in the case of *United Transportation Union v. Long Island Rail Road Co.*, 50 U. S. L. W. 4315 (March

24, 1982). The Court's decision in that case impacts directly on the issues raised in SEPTA's petition. SEPTA, therefore, respectfully submits this supplemental brief in accordance with Supreme Court Rule 22.6.[1]

II. ARGUMENT

In *United Transportation Union v. Long Island Rail Road Co.*, 50 U. S. L. W. 4315 (March 24, 1982) (hereinafter "*UTU*"), this Court held that application of the Railway Labor Act, 45 U. S. C. §§ 151, *et seq.*, to the Long Island Rail Road Co. (hereinafter "LIRR") did not violate the Tenth Amendment to the United States Constitution as that amendment was interpreted in *National League of Cities v. Usery*, 426 U. S. 833 (1976). The Court held that "operation of a railroad engaged in interstate commerce is not an integral part of traditional state activities generally immune from federal regulation under *National League of Cities*," 50 U. S. L. W. at 4317, and that States, by acquiring functions previously performed by the private sector, must not be allowed "to erode federal authority in areas traditionally subject to federal statutory regulation." *Id.* at 4318.

Although the present case appears to involve issues similar to those presented in *UTU*, it is distinguishable in three crucial respects. First, unlike LIRR, SEPTA is not now and has no intention of becoming a railroad. Second, SEPTA's direct operation of the passenger rail service at issue will not erode traditional federal authority. Third, this case involves an erroneous interpretation by the court

1. Supreme Court Rule 22.6 provides:

"Any party may file a supplemental brief at any time while a petition for writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of the party's last filing."

below of the Northeast Rail Service Act of 1981 (hereinafter "NRSA") [2] that was not addressed in *UTU* and that threatens the future of rail service in the Northeast.

A. SEPTA, Unlike the Long Island Rail Road, Is Not and Has No Intention of Becoming a Railroad.

The fact that LIRR is a railroad was crucial to the *UTU* decision. LIRR was formed as a private corporation in 1834 and did not come under public ownership until 1966. 50 U. S. L. W. at 4316. At all times, it was subject to and operated under the Railway Labor Act and other federal rail legislation. *Id.*

When the State of New York acquired LIRR, it accepted the fact that the railroad was subject to federal rail legislation and continued to operate it in accordance with those laws. The State did not question the applicability of the Railway Labor Act until it was confronted with the possibility of a strike. *Id.* Additionally, LIRR at one time had an extensive freight business and, this Court noted, continues to do "a significant volume of freight business, with 1979 freight revenue of over $12 million." 50 U. S. L. W. at 4316, n. 1.

SEPTA's contemplated operation of service previously provided by Conrail presents a far different picture. SEPTA has never operated a railroad nor does it intend to do so. SEPTA is a transportation authority required by state law to provide reliable and economic transportation services to the residents of the Philadelphia metropolitan area. Pursuant to this obligation, SEPTA, in 1976 and 1979, purchased from Conrail certain rights-of-way and rolling stock necessary for the provision of commuter rail service in the Philadelphia metropolitan area.[3] SEPTA

2. Subtitle E of Title XI of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357.

3. These purchases were made in accordance with the Regional Rail Reorganization Act of 1973, as amended, 45 U. S. C. §§ 701,

also contracted with Conrail for the operation of this service. By these actions, SEPTA fulfilled both its state mandate and one of the goals of the 3R Act which was to provide "assistance to States and local and regional transportation authorities for continuation of local rail services threatened with cessation." 45 U. S. C. § 701(b)(5).

SEPTA wishes to operate directly, using its own employees, rail services now provided for it by Conrail. However, SEPTA has no intention of providing service in the same manner that LIRR operates its railroad or in the same manner that Conrail has operated commuter rail service for SEPTA. SEPTA plans to convert the commuter rail system into a high-speed transit system resembling the high-speed line that runs over tracks once used by private railroads between Lindenwold, New Jersey and Philadelphia or resembling the subway and high-speed trolley lines in Philadelphia. These lines are more highly automated than railroad service and are run by transit employees who are not subject to federal rail legislation. SEPTA wishes to integrate this high-speed passenger rail service into its already multi-faceted transit system, as it has done successfully on the Newtown-Fox Chase line which it took over from Conrail on July 1, 1981. Thus, SEPTA will replace the present commuter rail system with a type of service akin to traditional urban mass transit services. This new service will be very different both from traditional railroad service such as that involved in the *UTU* case and from "commuter rail" service such as that now provided by Conrail.

The passenger rail system in the Philadelphia area is a purely local concern. Unlike the operations of LIRR,

3. (Cont'd)

et seq. (hereinafter the "3R Act"). The 3R Act was evidence of Congress' belief that certain rail services such as those involved in the present case are of primary concern to state and local governments.

SEPTA's rail service is not a part of the interstate rail system that has been the target of past federal rail legislation. Disruptions in service would not affect the national rail system or the national economy.[4] Only the regional economy would be affected; thus, it is Southeastern Pennsylvania that has a paramount interest in how the system is run, not the Federal Government. Additionally, unlike LIRR, SEPTA has never transported freight, made freight interchanges or received direct revenue from freight operations. This practice will not change. SEPTA also intends to discontinue its three interstate lines, thereby becoming a wholly intrastate operation.[5]

Unlike LIRR, SEPTA has never operated a railroad. SEPTA is a state agency which provides local public transportation in the manner it determines will best suit its constituents' needs. It has never been subject to federal rail legislation and it has never understood that it would lose its status as a transit authority and become a federally regulated railroad as soon as and to the extent that it operates itself any type of transit service over rail lines formerly used in the provision of commuter rail service.

As indicated by the above discussion, this case presents broader issues than those addressed in *UTU*. It focuses on local, urban mass transportation, not just rail service, and the question of whether that transportation is an integral part of traditional state activities immune from federal regulation under the Tenth Amendment. The *UTU* case, limited as it was to the operation of a railroad by an entity that had historically accepted and operated

4. In fact, Section 1158(a) of NRSA prohibits persons engaging in economic action over disputes with a commuter authority from engaging in any strike against or inducement of employees of Conrail where an effect thereof is to interfere with Conrail's rail freight service.

5. There are presently two lines running into New Jersey and one line running into Delaware.

under federal regulation, is not controlling here. The present case also questions the Special Court's construction of a new statute that will reshape rail transportation in the Northeast. That reshaping is already under way and requires this Court's guidance.

B. The Differences in the Statutes Being Challenged Distinguish This Case From *UTU*.

In *UTU*, the Long Island Rail Road sought to avoid the application of a statute to which, for 13 years, it acknowledged it was subject. That statute, the Railway Labor Act, epitomizes the long history of federal railroad regulation to which the Supreme Court repeatedly referred in its March 24, 1982 opinion.

SEPTA, on the other hand, is challenging the applicability and interpretation of a new statute, the Northeast Rail Service Act of 1981, Subtitle E of Title XI of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, which only became effective on August 13, 1981. While the Railway Labor Act may reflect the conclusion of Congress that "federal regulation of railroad labor relations is necessary to prevent disruptions in vital rail service essential to the national economy," *UTU*, 50 U. S. L. W. at 4318, NRSA reflects the conclusion of Congress that "commuter service" is distinguishable from other types of rail transportation and that the present methods of operating that service threaten the national rail system. NRSA's goal is to remove from Conrail the burden of operating commuter service and to transfer that burden to "commuter authorities" like SEPTA or to a newly created organization called Amtrak Commuter Services Corporation. If service is not operated by one of these parties, or by another contractor, it can be discontinued entirely.

NRSA's recognition that commuter rail service is unique is, in certain respects, consistent with the present

Administration's decision to reduce and eventually eliminate operating subsidies that have been relied upon in the past to sustain that service. The Administration believes that commuter rail service, unlike the national railroad industry, is a local concern that should be funded, if at all, locally.

What is not consistent is that, although NRSA reflects the Administration's belief that commuter rail service is distinct from the national rail system and is a local concern which must be funded locally rather than federally, the Special Court's interpretation of NRSA would result in the imposition of federal railroad standards and costs. Specifically, the Special Court's interpretation of NRSA dictates to a local transportation authority the employees it must hire if it intends to operate service previously provided by Conrail and the seniority rights of those employees, and designates the collective bargaining representatives of employees employed in the provision of commuter rail service. This patent inconsistency, increasing the State's responsibilities but decreasing its sovereignty, is intolerable and necessitates the interpretation of NRSA argued for in SEPTA's Petition for a Writ of Certiorari.

In its opinion in *UTU*, the Court stated that its "emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation." 50 U. S. L. W. at 4318. However, if *UTU* is held to preclude the granting of certiorari in the present case, the result will be the imposition of just such a static view.

In *UTU*, the Court emphasized the fact that LIRR is a "railroad," one which the State had operated under federal regulation, including the Railway Labor Act. The Court noted that railroads generally had been subject to

comprehensive federal regulation for nearly a century and that a State should not be allowed to erode this federal regulatory scheme.

The present case, however, comes in the wake of Congressional recognition, as expressed in NRSA, that local commuter rail service, regardless of how operated, is something quite distinct from the railroad industry that has been the subject of federal regulation for so many years. Commuter rail services increasingly have become integral components of regional transit systems. As this process continues, transit authorities must have the freedom and flexibility to determine the form these services should take and the manner in which these services are provided in order to best assure efficient, economic transportation. A denial of certiorari in the present case based on *UTU* and the consequent affirmance of the Special Court's interpretation of NRSA will deny transit authorities this freedom and flexibility and may well sound the death knell for an already beleagured service, with federally imposed operating rules and costs, which the Federal Government no longer feels it can afford to subsidize. SEPTA's desire to operate rail service free of the unreasonable labor restrictions of NRSA represents no greater erosion of the federal rail regulatory system than does the Administration's decision that local rail services must be funded locally, if at all.

The Federal Government's determination that commuter rail services must be financed by state and local governments significantly affects the inquiry called for in *UTU*. There, the Court held that its emphasis on traditional governmental functions and traditional aspects of state sovereignty

> "was meant to require an inquiry into whether the federal regulation affects basic State prerogatives in

> such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its separate and independent existence."

50 U. S. L. W. at 4318. LIRR failed to make the required showing because it had successfully operated a railroad under the Railway Labor Act for 13 years. SEPTA, on the other hand, if the Special Court's ruling is not reviewed, will be faced with the prospect of trying to fund, restructure and integrate, into an entirely state-regulated transit system, a commuter rail system that the Federal Government insists on regulating. These regulations, and the resultant higher costs, will not only create a drain on state and local funds and impair SEPTA's ability to provide the citizens of Southeastern Pennsylvania with the commuter rail service on which they depend, but will also impair SEPTA's ability to provide other mass transportation such as bus and trolley service. Or, stated another way, state and local funds which SEPTA will be forced to spend to operate an inefficient and expensive federally-regulated commuter rail system, on which the Philadelphia metropolitan region has become greatly dependent during its years of operation with federal subsidies, will no longer be available to finance other modes of transportation.

SEPTA provides a multi-faceted, integrated transportation system and has done so for many years. No private entity is in a position to provide this service which is so vital to the welfare of the people served. The fact that part of this service will be provided over rail lines once used by private railroads is no reason for treating that service differently from publicly operated bus, subway, high-speed or trolley service. All are part of a traditional aspect of state sovereignty that must be deemed immune from federal regulation.

III. CONCLUSION

For the reasons set forth above, SEPTA urges that this Court's decision in *United Transportation Union v. Long Island Rail Road* does not prevent the granting of SEPTA's Petition for a Writ of Certiorari.

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No. 81-1807

IN THE

Supreme Court of the United States

October Term, 1981

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
and
CONSOLIDATED RAIL CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT OF 1973

BRIEF FOR RESPONDENT, CONSOLIDATED RAIL CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Tenth Amendment to the United States Constitution limits the power of Congress to regulate passenger railroad operations because such railroads are operated by a state-created entity.

II. Whether the Special Court, Regional Rail Reorganization Act of 1973, correctly interpreted the Northeast Rail Service Act of 1981 to require state-created commuter authorities to negotiate employee transfer agreements with Conrail and unions representing transferred Conrail employees prior to the takeover, by a commuter authority, of a Conrail-operated commuter rail line.

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No. 81-1807

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Southeastern Pennsylvania Transportation Authority,

Petitioner,

v.

Railway Labor Executives' Association,
and
Consolidated Rail Corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT OF 1973

BRIEF FOR RESPONDENT CONSOLIDATED RAIL CORPORATION IN OPPOSITION

OPINIONS BELOW, JURISDICTION AND STATUTES INVOLVED

The Opinions Below, Jurisdiction and Statutes Involved are adequately set forth in the Petition for a Writ of Certiorari (hereinafter "Petition").[1]

STATEMENT OF THE CASE

The Northeast Rail Service Act of 1981 (hereinafter "NRSA") relieves Respondent Consolidated Rail Corporation (hereinafter "Conrail") of any obligation

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[1]The Respondent also incorporates by reference the Petition's Appendix, which includes the Opinion and Judgment of the Special Court, filed January 27, 1982, and March 11, 1982, respectively, for which review is sought.

to provide commuter rail service as of January 1, 1983, Subtitle E of Title XI of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1136, 95 Stat. 357.

In determining that Conrail would be relieved of any obligation to provide commuter rail service, Congress provided a mechanism for a smooth transition of commuter operations from Conrail to Amtrak Commuter and/or various commuter authorities, including Petitioner Southeastern Pennsylvania Transportation Authority (hereinafter "SEPTA").[2] The interpretation and constitutionality of certain of the transitional provisions of NRSA are at issue in this case. Those provisions are reproduced in Petitioner's App. at A48-A53.

On the date that NRSA became effective, August 13, 1981, Conrail was operating commuter rail lines for state-created commuter authorities that made payments to Conrail as required by § 304 of the Regional Rail Reorganization Act of 1973, as amended, 45 U.S.C. § 744. SEPTA is a commuter authority created to serve the Philadelphia metropolitan area. After April 1, 1976, SEPTA made subsidy payments to Conrail under § 304 of the Regional Rail Reorganization Act to continue operation of thirteen commuter rail lines radiating from Philadelphia.

Co-Respondent Railway Labor Executives' Association (hereinafter "RLEA") is composed of the chief executive officers of many of the railway labor unions in the United States. Many of the RLEA constituent unions have collective bargaining agreements with Conrail, and some of those

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[2]Amtrak Commuter was created pursuant to NRSA to operate passenger rail lines at the request of state commuter authorities after January 1, 1983, NRSA, Pub. L. No. 97-35, § 1137, 95 Stat. 357. The details of its operating authority are not at issue in this case.

agreements apply to Conrail employees who work on the SEPTA-subsidized rail lines.

In early 1981, SEPTA made a renewed subsidy offer to Conrail which excluded funds to operate a segment of one of thirteen Philadelphia commuter rail lines, the Fox Chase-Newtown line. After negotiations, and effective July 1, 1981, Conrail and SEPTA came to an agreement on the subsidy offer, but no funds were provided for operaiton of the Fox Chase-Newtown segment. Therefore, as of July 1, 1981, Conrail ceased service from Fox Chase to Newtown.

Between July 1, 1981 and October 5, 1981, SEPTA rehabilitated the Fox Chase-Newtown rail segment and provided bus service to an adjacent line to accommodate passengers. On Ocober 5, 1981, SEPTA commenced commuter rail service on the rehabilitated line, but did so without any of the Conrail employees who had previously operated the Fox Chase-Newtown line.

Shortly before SEPTA commenced the Fox Chase-Newtown rail service, RLEA brought suit against SEPTA and Conrail in the Special Court, Regional Rail Reorganization Act of 1973.[3] RLEA alleged that prior to commencing commuter operations, SEPTA is required to negotiate an implementing agreement with Conrail and the unions representing the Conrail employees affected by the transfer of operating responsibility. RLEA's complaint sought declaratory and injunctive relief.

The Special Court, composed of Judges Friendly, Wisdom and Thomsen, heard argument on October 5, 1981, and denied the request for a temporary restraining order. Subsequently, the parties entered into a stipulation of facts and RLEA amended its complaint to

[3]Conrail was named as a defendant in the RLEA complaint pursuant to Fed. R. Civ. P. 19.

cover the controversy created by SEPTA's announced plans to operate all commuter services out of Philadelphia's Reading Terminal without negotiating with Conrail or the Conrail employee unions.

In its brief and at oral argument on December 21, 1981, SEPTA contended that the Northeast Rail Service Act does not require negotiation of employee transfer agreements unless a commuter authority, e.g. SEPTA, desires to utilize Conrail employees in connection with the commuter rail service taken over by the authority. If the statute is interpreted to impose such a negotiation requirement, SEPTA argued, it is unconstitutional as an infringement of state authority under *National League of Cities v. Usery*, 426 U.S. 833 (1976).

In an exhaustive opinion, the Special Court, *per* Judge Friendly, rejected SEPTA's statutory and constitutional arguments. The Special Court held that NRSA requires SEPTA to negotiate an agreement with Conrail and unions representing Conrail employees prior to commencement of rail service on lines formerly subsidized by SEPTA, Pet. App. at A15-A37. The Special Court also held that even if NRSA regulates an "integral" and "traditional" state function under *National League of Cities*, NRSA is constitutional because of the important and transcending federal interests at stake, Pet. App. at A37-42. The Special Court's Judgement was filed on March 11, 1982.

On March 29, 1982, SEPTA filed its Petition for a Writ of Certiorari.[4] SEPTA contends that a Writ should issue because the Special Court has misinterpreted *National League of Cities v. Usery*, 426 U.S. 833 (1976), *Hodel v. Virginia Surface Mining & Reclamation Assoc., Inc.*, 452 U.S. 264 (1981), and NRSA. SEPTA claims that, as a result of the Special Court's ruling, local transportation

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[4]A Supplemental Petition was also filed. Unless otherwise noted, both petitions are referred to as the "Petition".

planning, state regulation of mass transportation, and "the future of passenger rail service in the Northeast" are threatened. Petition at 4, 9.

REASONS FOR DENYING THE WRIT

I. The Special Court correctly held that the Northeast Rail Service Act of 1981 does not unconstitutionally infringe upon traditional state functions under *National League of Cities*.

The Constitutional question presented by SEPTA was answered by the Court's decision in *United Transportation Union v. Long Island Rail Road*, No. 80-1925, 50 U.S.L.W. 4315 (March 24, 1982). The decision of the Special Court antedated the *Long Island Rail Road* decision. Nevertheless, the Special Court's rejection of SEPTA's Tenth Amendment challenge to Congress' decision to regulate certain labor relations aspects of the transition of commuter rail responsibilities from Conrail to public commuter authorities accurately anticipated the *Long Island Rail Road* decision. They are harmonious in both analysis and result. SEPTA's Constitutional question is not an appropriate basis for granting the petition for a writ of certiorari.

The Court's opinion in *Long Island Rail Road* reverses the Court of Appeals' holding principally relied upon by SEPTA, restates the balancing test followed by the Special Court, *Long Island Rail Road, supra*, slip op. at 5, n.9, and conclusively establishes that "operation of a passenger railroad is not among those governmental functions generally immune from federal regulation under *National League of Cities...*" slip. op. at 7.

In its Petition, SEPTA attempts to distinguish its operation from that of the Long Island Rail Road on the basis that the Long Island carries freight. See Petition at 12. SEPTA also claims that the alleged "pervasive"

nature of NRSA regulation, as well as the fact that SEPTA has never before been subject to federal railroad regulation, are distinguishing facts. This Court soundly rejected the suggested "freight" distinction in *Long Island Rail Road.*[5] SEPTA never operated a railroad line before October 5, 1981. Its claim that it was never before subject to federal railroad laws is thus not a material distinction. Finally, the allegedly "intrusive" nature of NRSA is not significant if the Petitioner cannot satisfy the other requirements of National League of Cities. See *Hodel v. Virginia Surface Mining and Reclamation Assoc., Inc., supra,* 452 U.S. at 292, n.33. Thus the Long Island Rail Road holding is controlling precedent.[6]

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[5]This Court said: "The Court of Appeals undertook to distinguish the three railroad cases discussed in *National League of Cities,* noting that they dealt with freight carriers rather than primarily passenger railroads such as the Long Island. That distinction does not warrant a different result, however. Operation of passenger railroads, no less than operation of freight railroads, has traditionally been a function of private industry, not state or local governments. It is certainly true that some passenger railroads have come under state control in recent years, as have several freight lines, but that does not alter the historical reality that the operation of railroads is not among the functions traditionally performed by state and local governments. Federal regulation of state-owned railroads simply does not impair the State's ability to function as a State."

Long Island Rail Road, supra, slip. op. at 7.

[6]As part of its effort to avoid the holding of *Long Island Rail Road,* SEPTA refers to its commuter rail service as "high speed rail service" and claims that the Special Court's ruling grants Congress "plenary power to regulate and control local transportation." Petition at 5,9. The Special Court found that the service offered by SEPTA is at no higher speed than that offered by Conrail, Pet. App. at A5, n.4. SEPTA's effort to label its rail service "local transportation" is also ineffective. SEPTA could call its operation a "commuter railroad" and still not avoid the holding of *Long Island Rail Road,* see *Long Island Rail Road, supra,* slip op. at 7, n.12.

In sustaining the constitutionality of NRSA's commuter-transition provisions, the Special Court's opinion identified important federal interests that "transcend" SEPTA's local concerns, Pet. App. at A42. The Special Court explained:

> We are not dealing here with an across the board statute like the Fair Labor Standards Act in which the Federal government's interests in wages and hours of state and local employees was simply the same interest that it had in regulating all other employees engaged in or producing goods for commerce. The instant controversy arises in the context of an intensive federal effort to preserve both passenger and freight rail transportation in the northeastern states and passenger service throughout the nation — an effort which has cost billions of dollars of federal funds and from which Pennsylvania has derived great benefits. The Government's interests in minimizing future costs for Conrail and itself and in seeking to preserve labor peace and employee morale clearly transcend Pennsylvania's interest in having SEPTA free from what is ultimately an arbitral process to determine how its initial employment complement should be set and from bargaining under the Railway Labor Act rather than Pennsylvania's Public Employees Law.

Id. (Footnote omitted). The Special Court did not simply conclude that the federal interests are important; the court held that the federal interests "transcend", or are *more important* than SEPTA's interests.

There can be no doubt that SEPTA's "integral" and "traditional" function argument is precluded by the

holding in *Long Island Rail Road*. Further, the balancing test contained in the Special Court's opinion is proper under *Hodel, National League of Cities*, and *Long Island Rail Road*. The Special Court's opinion correctly concludes that the federal interests outweigh the concerns of individual commuter authorities. Thus, the question raised on the petition has been dispositively resolved by the Court's decision in *Long Island Rail Road*.

II. Section 1145 of the Northeast Rail Service Act of 1981 requires SEPTA to negotiate an agreement with Conrail and unions representing Conrail employees employed on the commuter rail lines that SEPTA intends to operate, prior to the operation of those lines.

The Special Court, Regional Rail Reorganization Act of 1973, was originally established by Congress to exercise exclusive jurisdiction over certain specific matters arising out of implementation of the Regional Rail Reorganization Act of 1973, as amended. The Special Court's continued responsibility for the adjudication of disputes involving Conrail-related legislation was provided for by Section 1152 of the Northeast Rail Service Act. Section 1152(a) of NRSA states that:

> The Special Court shall have original and exclusive jurisdiction over any civil action —
>
> 1) for injunctive, declaratory, or other relief relating to the enforcement, operation, execution or interpretation of any provision or amendment made by this subtitle or administrative action taken thereunder to the extent such action is subject to judicial review.

NRSA, Publ. L. No. 97-35, § 1152, 95 Stat. 357.

Thus, Congress has established a single three-judge district court of the United States and vested in that

court the jurisdiction to resolve disputes regarding interpretation of the Northeast Rail Service Act.[7]

The second question presented to the Court in SEPTA's Petition involves the Special Court's interpretation of specialized statutory provisions applicable only to the transfer of commuter responsibility from Conrail to individual commuter authorities and/or Amtrak Commuter.

The Special Court's opinion contains a thorough review of the relevant legislative history and a detailed analysis of the statutory language. There are no special or important reasons supporting review by the Court on a writ of certiorari. See Sup. Ct. R. 17.1. Because the Special Court has original and exclusive jurisdiction over the dispute, its decision can not and does not conflict with a decision of another federal or state court. The interpretation of a provision of the Northeast Rail Service Act, although of significance to the parties in this litigation, does not involve an important question of federal law which has not been but should be settled by this Court. Finally, there is no representation in the petition that the judicial proceedings below call for the exercise of the Court's supervisory responsibilities. The petition fails to state important reasons why the Court should grant the petition and review the Special Court's decision interpreting Sections 508 and 510 of the Rail Passenger Service Act, as added by the Northeast Rail Service Act of 1981.

Notably absent from SEPTA's arguments in support of its interpretation of Sections 508 and 510 is any

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[7]Subsection (b) of Section 1152 provides that judgments of the Special Court, subject to one presently inapplicable exception, are reviewable only upon petition for a writ of certiorari to the Supreme Court. Review by the Supreme Court is exclusive and any petition must be filed within 20 days after entry of the Special Court's order or judgment.

discussion of the purpose, structure and legislative history of NRSA. Respondent Conrail submits that the Special Court's detailed analysis of the text of the statute, Pet. App. at A7-A15, A19-A25, is completely uncontradicted by SEPTA's Petition. Likewise, SEPTA ignores the Special Court's thorough analysis of NRSA's legislative history, Pet. App. at A-25 - A-32.

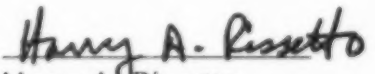
SEPTA also argues that neither the Regional Rail Reorganization Act nor the Railroad Revitalization and Regulatory Reform Act "required a state transit authority to avail itself of the procedures set forth therein", Petition at 15. Therefore, according to SEPTA, NRSA should be read as incorporating similar voluntary options, Petition at 16. That Congress may have provided such options in prior railroad legislation does not support SEPTA's position. Rather, the clear existence of such options in prior legislation indicates that Congress knew how to draft such legislation, if it intended to do so. Congress chose otherwise. In fact, it used this legislation as the vehicle for expressly including commuter rail labor relations within the ambit of Congress' authority and responsibility to regulate rail service affecting interstate commerce, *See* NRSA, Pub. L. No. 97-35, § 1157, 95 Stat. 357; *cf. Long Island Rail Road, supra,* slip op. at 4, n.4.

Therefore, all of SEPTA's reasons for granting the writ to review the Special Court's interpretation of the statute are unavailing.

CONCLUSION

For the foregoing reasons, Respondent, Consolidated Rail Corporation, respectfully submits that the Petition for a Writ of Certiorari to the Special Court, Regional Rail Reorganization Act of 1973, should be denied.

Respectfully submitted,



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Respondents.

On Petition For A Writ Of Certiorari To The Special Court, Regional Rail Reorganization Act Of 1973

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether the Special Court, Regional Rail Reorganization Act of 1973, was correct in interpreting Section 508 of the Rail Passenger Service Act, as amended by the Northeast Rail Service Act of 1981, to require any commuter authority that intends to operate commuter service formerly operated by Conrail pursuant to the Regional Rail Reorganization Act of 1973, to first enter into an implementing agreement with Conrail and the representatives of the employees of Conrail in commuter service.

II. Whether the Special Court was correct in interpreting Section 510 of the Rail Passenger Service Act, as amended by the Northeast Rail Service Act of 1981, to require any commuter authority that intends to operate commuter service formerly operated by Conrail pursuant to the Regional Rail Reorganization Act of 1973 to enter into collective-bargaining agreements with representatives of the employees of Conrail performing commuter service.

III. Whether Sections 508 and 510 of the Rail Passenger Service Act Amendments contained in the Northeast Rail Service Act of 1981 as interpreted by the Special Court are violative of the Tenth Amendment to the United States Constitution.

IV. Whether the intended operation by a state of a commuter railroad is an integral state function immune from federal regulation under the Tenth Amendment to the United States Constitution.

V. Whether by notifying Conrail and Amtrak Commuter on or about March 29, 1982, pursuant to Section 506(a) of the Rail Passenger Service Act, as amended by the Northeast Rail Service Act of 1981, that it intends to contract with Amtrak Commuter for the operation of commuter rail service in the Southeastern Pennsylvania Region, SEPTA has rendered the questions presented in its Petition for Certiorari moot.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1807

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,
Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
and
CONSOLIDATED RAIL CORPORATION,
Respondents.

On Petition For A Writ Of Certiorari To The Special Court, Regional Rail Reorganization Act Of 1973

RESPONDENT RAILWAY LABOR EXECUTIVES' ASSOCIATION'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

This case presents a statutory and constitutional challenge by the Southeastern Pennsylvania Transit Authority ("SEPTA") to certain amendments to the Rail Passenger Service Act (hereinafter, "RPSA"), contained in the Northeast Rail Service Act of 1981 (hereinafter, "NERSA"), Subtitle E of Title XI of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1136, 95 Stat. 643. As suggested by the Court below, the keys to the solution of this controversy are to be found in the language of the statute itself, as well as in the legislative history viewed in the context of the attempt by the Congress to find a

solution to the crisis of railroad transportation in the Northeast region of the United States.

As the record in this case indicates, prior to SEPTA's operation of its Fox Chase to Newtown commuter rail service on October 5, 1981, SEPTA had no direct involvement in the operation of commuter railroad service. Prior to April of 1976, SEPTA made subsidy payments to the Reading and Penn Central Railroads (and later to their trustees in bankruptcy) for commuter rail service on thirteen (13) lines radiating from Center City, Philadelphia. In the period immediately prior to 1972, seven (7) bankrupt railroads in the Northeast region, including the Reading and Penn Central, were undergoing reorganization pursuant to Section 77 of the Bankruptcy Act (11 U.S.C. § 205). Neither SEPTA, nor the State of Pennsylvania were able and/or willing to acquire from the Reading and Penn Central the facilities to operate commuter rail service on their own account.

During the extended period of reorganization, the rail structures and facilities of the various bankrupt railroads deteriorated greatly, hindering continued operation. This led to vast expenditures of funds merely to keep the railroads operating; [1972] U.S. CODE CONG. & AD. NEWS, pp. 3242-51. For this and other reasons, the railroads in reorganization were ultimately unable to formulate acceptable plans of reorganization. Confronted with the imminent cessation of the essential rail service provided by these railroads, various states, localities, indenture trustees, labor unions, concerned citizens and shippers petitioned the Congress for a solution to this crisis.

In response to the threatened liquidation of these major rail carriers and the effect that the elimination of this essential rail service would have on the economy of not only the Northeast but the nation as a whole, the Congress enacted the Regional Rail Reorganization Act of 1973 (3R Act) (45 U.S.C. § 701, *et seq.*). This legislation created, *inter alia*, Conrail, which would

assume the responsibility for the operation of freight as well as commuter rail services if certain statutory conditions were met. Section 304 of the 3R Act obligated Conrail to continue providing passenger rail service for any commuter authority that made "a rail service continuation payment." 3R Act, § 304(c)(2)(A). SEPTA has made rail subsidy payments for the operation by Conrail of commuter rail service in the Philadelphia area and continues to make such payments up to the present time.

The 3R Act was the first of several pieces of legislation addressing the future of railroad transportation in the Northeast. The Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act) (45 U.S.C. § 801, *et seq.*) was enacted, *inter alia*, to "rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States." 4R Act, § 101(a). Similarly, the Rail Passenger Service Act, to improve rail passenger service and to create a national rail passenger corporation (Amtrak) was enacted along with other pieces of federal legislation such as the Staggers Rail Act of 1980, P.L. 96-448, and the Northeast Rail Service Act of 1981, whose provisions are at issue here.

In addition to enacting legislation, the Congress appropriated vast sums of money to purchase, revitalize, and repair railroad trackage, equipment and facilities and to underwrite similar capital programs by the states. Under related transportation programs such as the Urban Mass Transportation Assistance Act, 49 U.S.C. §§ 1601, *et seq.*, the federal government appropriated additional billions of dollars to subsidize commuter rail services. The Court below, on the basis of the extensive record before it, found that Pennsylvania derived great benefit from these federal capital and operating subsidies (Appendix A, p. A42).

The legislation at issue here, the Northeast Rail Service Act of 1981 (NERSA), was intended by the Congress, *inter alia*, to

relieve Conrail of an increasingly burdensome commuter rail service by January 1, 1983, and to facilitate the orderly transfer of commuter rail service responsibilities to local commuter authorities or to the newly formed Amtrak Commuter Services Corporation (Amtrak Commuter). NERSA contains several provisions designed to facilitate this transfer of commuter service responsibilities which include, *inter alia*, an appropriation of $50 million for the transfer of commuter service responsibility [Section 1139(a)], as well as Section 1145 governing the transfer of passenger service employees to a commuter authority that intends to assume the operation of commuter services from Conrail or to Amtrak Commuter.

During the pendency of this litigation, SEPTA announced its intention to assume the responsibility for the operation of commuter service that has been operated by Conrail on the effective date of NERSA without first complying with the labor transfer provisions found in Section 1145 of that Act. In response to this announcement, respondent RLEA amended its Complaint below to raise this new issue.[1] However, on March 29, 1982, SEPTA, through its Chairman David Girard-di Carlo, informed Conrail and Amtrak Commuter, pursuant to Section 506(a) of the RPSA, as amended by NERSA (RLEA Appendix A-1), "that SEPTA intends to contract with Amtrak Commuter for the operation of commuter rail service in the Southeastern Pennsylvania Region" (RLEA Appendix A-2).

---

[1] The gravamen of RLEA's initial complaint was that in commencing operation of its "high-speed passenger service" over the Fox Chase-Newton line without first complying with Sections 508 and 510 of the RPSA, as amended by Section 1145 of NERSA, SEPTA was in violation of NERSA. The Court below, however, held that this service was not subject to the requirements of Sections 508 and 510 and that finding is not at issue here.

REASONS FOR DENYING THE WRIT

I. The Special Court Correctly Interpreted The Plain Meaning Of The Labor Transfer Provisions Of The Northeast Rail Service Act of 1981.

The Special Court recognized that all that was required to sustain the position of the respondent RLEA below was to apply the plain meaning of the language of § 508 of the Rail Passenger Service Act. The Court stated:

> " . . . Section 508(a) provides that 'Conrail, commuter authorities that intend to operate commuter service, and [representatives of labor]shall enter into negotiations or an implementing agreement [regarding the transfer of Conrail employees to commuter authorities].' SEPTA has made it abundantly clear that it 'intend[s] to operate commuter service' on the lines here at issue. Thus, RLEA argues, SEPTA is within the terms of § 508(a), and as that section provides, SEPTA 'shall enter into [labor transfer] negotiations.' "

(Appendix A, p. A19).

SEPTA, in its Petition for a Writ of Certiorari, does not dispute that it "intends to operate commuter service."[2] Assuming, *arguendo*, that SEPTA intends to operate commuter service, then it is intuitively obvious that the plain and simple requirements of Section 508 of the Rail Passenger Service Act are applicable by their own terms.

---

[2] Since in a letter dated March 29, 1982 (Appendix A-2), SEPTA notified Conrail and Amtrak Commuter that SEPTA intended to contract with Amtrak Commuter for commuter services formerly operated by Conrail, its petition herein is arguably mooted, for it appears that SEPTA no longer intends to operate the service on its own account, which was the issue before the Special Court in the case at bar. *See, Hall* v. *Beals*, 396 U.S. 45 (1969). Further, there is now grave doubt as to whether SEPTA has standing to raise the Questions Presented given that it is no longer a commuter authority that intends to operate commuter service on its own account. *Warth* v. *Seldin*, 422 U.S. 493 (1975); *Sierra Club* v. *Morton*, 405 U.S. 727 (1972).

The Special Court indeed recognized that the position of the RLEA was extremely simple on this point, stating that:

> "It is difficult to see any basis for disagreeing with RLEA's reading of Section 508(a) so long as one focuses solely on that section. The two phrases on which RLEA's argument hangs — 'commuter authorities that intend to operate commuter service' and 'shall negotiate' seem clearly to apply to SEPTA. . . ." (Appendix A, p. A20).

As the Court below properly noted, SEPTA's attempt to avoid the force of the RLEA's argument that the plain meaning of the statute mandated the result below in the first instance relies on what the Court termed a "tortured reading of Section 508(a)," to wit, that if there are no employees to be transferred, obviously negotiations are unnecessary. The Court recognized this argument as being one which begs the question. (Appendix A, p. A21). The Court further noted that the phrase "to be transferred" seems addressed to a question entirely different from whether or not Section 508(a) requires a commuter authority to negotiate. The Court stated:

> "It makes perfect sense to read the phrase as defining *which labor representatives* are permitted to enter into labor transfer negotiations. . . ." *(Id.) (emphasis in original)*

Finally, the Court noted that the phrase "to be transferred" is also used in Section 508(b) which is identical to Section 508(a) except that it applies to the transfer of Conrail employees to Amtrak Commuter rather than to commuter authorities. The Court noted:

> "Since the phrase 'to be transferred' cannot have been meant to give Amtrak Commuter the option of disregarding the statutory procedures established by Section 508, it is difficult to argue that the identical phrase, when used a half dozen lines earlier in the same section, was intended

> to give commuter authorities such power. . . ." (Appendix A, p. A22).

SEPTA's second argument, and the one principally advanced here, is that NERSA was not intended to set forth the only avenues by which commuter authorities could assume commuter services responsibility previously provided by Conrail. The Court below again relied upon the plain meaning of the statute in stating:

> ". . . Congress could well have intended that a commuter authority be free to pursue any of a number of alternatives, but if it chose one of the options dealt with by the statute, then the statutory framework had to be followed. This interpretation of Section 508(a) is supported by the language that Congress used in setting forth the labor transfer procedure. As noted earlier, Section 508(a) states flatly that 'commuter authorities that intend to operate commuter service . . . shall enter negotiations. . . .' At least on its face this provision, with its use of the mandatory 'shall,' supports interpreting that Act as directing that once a commuter authority determines to operate some commuter service, then NERSA's labor transfer provisions are mandatory. . . ." (Appendix A, p. A25).

The Special Court went further and wrote an exhaustive study of the legislative history of the passage of the labor transfer provisions of NERSA (Appendix A, pp. A25-36) with the result that the Court found that the legislative history merely confirmed the plain meaning of the statute itself. This Court has repeatedly and recently recognized that plain and simple statutes mean precisely what they say. *See, American Tobacco Co.* v. *Patterson*, ____ U.S. ____, 50 U.S.L.W. 4364, 4365-66 (April 5, 1982). The Special Court did no more than apply this cardinal principle of statutory construction.

SEPTA's only real response to the Special Court's analysis is its opinion that since previous railroad statutes did not contain labor transfer requirements, neither may NERSA. This points up the basic flaw in SEPTA's statutory argument to this Court,

that is, that it wishes this Court to judicially amend the statute at issue, rather than deal with the statute actually passed by the Congress and signed by the President. This Court has on many occasions in the past and recently adhered to the view that the Congress is free within the bounds of the Constitution to legislate toward such ends as it itself chooses without interference from the Judiciary. *U.S. Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 179 (1980).

II. The Tenth Amendment To The United States Constitution Does Not Exempt The States From Federal Legislation In Areas Of Overriding Federal Interest Where State Compliance With Federal Standards Is Essential.

The Court below, upon consideration of the extensive record of federal involvement, subsidy and regulatory support of the railroad network in the Northeast and the competing state interests advanced by SEPTA, coupled with its intimate knowledge of the federal efforts "to preserve both passenger and freight rail transportation in the Northeastern states and passenger service throughout the nation" (Appendix, p. A42) concluded that a fundamental element of this federal effort, the labor transfer provisions of NERSA at issue here, was entitled to prevail over the Tenth Amendment challenge advanced by SEPTA. The Petitioner states that in so resolving the issue, the Court below "relied exclusively on a self-styled balancing test" (Petition for a Writ of Certiorari to the Special Court, Regional Rail Reorganization Act of 1973, p. 12, hereinafter "Petition, p."). Far from being a "self-styled balancing test" this weighing of state and federal interests in areas of paramount federal concern has been an essential element of this Court's Tenth Amendment jurisprudence.

In his pivotal concurrence in *National League of Cities* v. *Usery*, 426 U.S. 833, 856 (1976) (Justice Blackmun, concurring), Justice Blackmun lends his support to the plurality on the

understanding that the opinion authored by Justice Rhenquist "adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." *Id.* at 856. Agreeing that an extension of the provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.*, to state employees did not evidence a "demonstrably greater" federal interest in the conduct of state labor relations, Justice Blackmun lent his support to the Rhenquist plurality creating a majority.

While the Court below did not rely on the case of *Fry* v. *United States*, 421 U.S. 542 (1975), this Court's Tenth Amendment analysis in *Fry* clearly supports the Special Court's holding. In that case, this Court upheld the constitutionality of the Economic Stabilization Act of 1970 as applied to state employees. In *National League of Cities* v. *Usery*, *supra*, this Court reaffirmed its holding in *Fry* v. *United States*, stating "the enactment at issue there was occasioned by an extremely serious problem which endangered the well being of all the component parts of our federal system and which only collective action by the national Government might forestall." 426 U.S. at 853.

This balancing of state and federal interests in areas of paramount federal concern was fully articulated as part of this Court's Tenth Amendment analysis in *Hodel* v. *Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 69 L.Ed.2d 1 (1981). In *Hodel*, *supra*, after stating the three-part test for a Tenth Amendment exemption to Congressional commerce clause power, this Court went on to state that:

> "Demonstrating that these three requirements are met does not, however, guarantee that a Tenth Amendment challenge to Congressional commerce power action will succeed. There are situations in which the nature of the federal

> interest advanced may be such that it justifies state submission. (citations omitted).

69 L.Ed.2d 23, n.29.

Various Courts of Appeals have employed this balancing test in cases raising a Tenth Amendment challenge to federal legislation. The Second Circuit in *Friends of the Earth* v. *Carey*, 552 F.2d 25 (2d Cir. 1977), *cert. denied*, 434 U.S. 902 (1977) upheld the constitutionality of the Clean Air Act, §§ 101, *et seq.* as amended by 42 U.S.C. §§ 1857, *et seq.*, in the wake of a Tenth Amendment challenge stating: "[T]he Clean Air Act Amendments of 1970 are directed toward a significant national health and safety problem — air pollution — which respects no political boundaries . . ." 552 F.2d at 39. A similar Tenth Amendment challenge was rejected by the Ninth Circuit in *State of Arizona* v. *Atchison, Topeka and Santa Fe Railroad Company*, 656 F.2d 398 (9th Cir. 1981). In that case, the State of Arizona challenged a provision of the 4R Act, 45 U.S.C. §§ 801, *et seq.*, prohibiting certain discriminatory state tax assessments on railroad property, as violative of the Tenth Amendment. In rejecting this constitutional challenge, the Court held:

> "In *National League of Cities* the state interest outweighed the federal interest because of the severe burdens imposed on the states by the federal regulation, and the minimal effect of the statute on interstate commerce. In the case before us, however, the burden on the state is small in comparison to the benefit to interstate commerce.

656 F.2d at 408-09. Similarly, in rejecting a Tenth Amendment challenge to the Veteran's Reemployment Rights Act, 38 U.S.C. §§ 2021, *et seq.*, the Fifth Circuit in *Peel* v. *Florida Department of Transportation*, 600 F.2d 1070 (5th Cir. 1979) held "[w]here collective action becomes necessary to deal with serious national problems, the protected area of state sovereignty must give way to Congressional mandate." 600 F.2d at 1084.

SEPTA has advanced as an important state interest its desire to be governed by state rather than federal law in its operation of commuter rail service. The Court below considered this concern when it weighed the competing state and federal interest in its analysis of SEPTA's Tenth Amendment challenge. However, the Court concluded that the federal interest in the survival of the railroad network in the Northeast "clearly transcended Pennsylvania's interest in having SEPTA free from what is ultimately an arbitral process to determine how its initial employment complement should be set and from bargaining under the Railway Labor Act rather than Pennsylvania's Public Employees Law" (Appendix, p. A42). Respondent RLEA respectfully submits that the Special Court struck the proper balance in this case and as a result, SEPTA's Petition for a Writ of Certiorari should be denied.

III. This Court's Holding In *United Transportation Union* v. *Long Island Railroad Company, et al.*, ____ U.S. ____, 50 U.S.L.W. 4315 (March 24, 1982), That The Operation By The State Of A Commuter Railroad Does Not Constitute A Traditional State Function, Is Dispositive Of The Tenth Amendment Challenge Raised In SEPTA's Petition For A Writ Of Certiorari In This Case.

In the case of *United Transportation Union* v. *Long Island Railroad Company, et al.*, ____ U.S. ____, 50 U.S.L.W. 4315 (March 24, 1982) this Court unanimously overturned a decision of the United States Court of Appeals for the Second Circuit holding that a state-owned commuter railroad was exempt, under the Tenth Amendment, from the federal regulation of labor relations in the railroad industry. In an analysis drawing much of its support from a series of prior cases upholding federal regulation of state-owned railroads,[1] this Court held

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[1] *Parden* v. *Terminal R. Co.*, 377 U.S. 184 (1964); *California* v. *Taylor*, 353 U.S. 553 (1957); *United States* v. *California*, 297 U.S. 175 (1936). This line of cases was explicitly reaffirmed in this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833, 854, n.18 (1976).

that "a passenger railroad is not among those governmental functions generally immune from federal regulation under *National League of Cities*." 50 U.S.L.W. at 4317. Having failed to satisfy one of the three elements of the test announced in *Hodel* v. *Virginia Surface Mining & Reclamation Association, Inc.*, *supra*, this Court concluded that the Long Island Railroad is not immune from federal regulation of its labor relations on the basis of the Tenth Amendment.

Petitioner SEPTA has utilized the Second Circuit's decision in *United Transportation Union* v. *Long Island Railroad*, 634 F.2d 19 (2nd Cir. 1980), to support its argument below that the imposition of the labor transfer provisions of NERSA on a state agency like SEPTA is violative of the Tenth Amendment. Given the fact that SEPTA could cite no other case where a federal court has upheld a Tenth Amendment challenge to federal regulation of a state owned commuter railroad, the Second Circuit's decision was a crucial element of its argument. SEPTA, however, in its Petition for a Writ of Certiorari, attempts to distinguish the *Long Island* case from the case *sub judice*, arguing that NERSA is more intrusive and more pervasive than either the Railway Labor Act or the Fair Labor Standards Act. This assertion, however, was rejected by the Court below when it found the conflict between the New York State Taylor Law, N.Y. Civ. Serv. Law § 210 (McKinney 1973 Supp. 1980-1981) and the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*, over the right to strike was more acute than the conflict between NERSA and the Pennsylvania Public Employee Relations Act, Act of July 23, 1970, P.L. 563, No. 195, 43 P.S. § 1101.101 *et seq.*, which both guaranteed the right to strike under certain conditions (Appendix, p. A40). Moreover, the federal interest in a "uniform regulatory scheme," is more pronounced here where the Congress had determined that the survival of the rail network in the Northeast is at stake. *See*, Section 1132 of NERSA; *Fry* v. *United States*, *supra*.

Respondent RLEA respectfully submits that this Court's holding in *United Transportation Union* v. *Long Island Rail Road, et al., supra,* is dispositive of the Petitioners' Tenth Amendment claim and as such SEPTA's Petition for a Writ of Certiorari should be denied.

CONCLUSION

For all the foregoing reasons, the petition of SEPTA for a writ of certiorari to the Special Court, Regional Rail Reorganization Act of 1973 should be denied.

Respectfully submitted,

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Dated: April 29, 1982

Appendix

APPENDIX A-1

Rail Passenger Service Act § 506(a), as added by the Northeast Rail Service Act of 1981, Subtitle E of Title XI of the Omnibus Budget Reconcilation Act of 1981, Pub. L. 97-35, § 1137, 95 Stat. 650.

(a) Not later than April 1, 1982, each commuter authority shall notify Amtrak Commuter and Conrail whether it intends to operate its own commuter service or to contract with Amtrak Commuter for the operation of such service.

APPENDIX A-2

March 29, 1982

Richard C. Sullivan
Vice President-Passenger Services
Consolidated Rail Corporation
1401 Arch Street
Philadelphia, PA 19107

Dear Mr. Sullivan:

Pursuant to Section 506(a) of the Rail Passenger Service Act, as amended, and in accordance with a Resolution adopted by the Board of the Southeastern Pennsylvania Transportation Authority (SEPTA), on March 24, 1982, SEPTA hereby serves notice on Consolidated Rail Corporation that SEPTA intends to contract with Amtrak Commuter for the operation of commuter rail service in the Southeastern Pennsylvania region.

Sincerely,

/s/ DAVID F. GIRARD-diCARLO
David F. Girard-diCarlo
Chairman

cc: David W. Marston
President and Chairman of the Board
Amtrak Commuter Services Corporation

Brief for the United States

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 81-1807

In the Supreme Court of the United States

OCTOBER TERM, 1981

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT OF 1973

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

The United States will address the following question:

Whether the doctrine of intergovernmental immunity recognized in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), precludes Congress from requiring that local commuter authorities that intend to provide commuter rail service previously provided by Conrail negotiate implementing and collective bargaining agreements with Conrail and the labor organizations representing employees of Conrail who are to be transferred to the local commuting authority.

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In the Supreme Court of the United States

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SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT OF 1973

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

Relying on the Tenth Amendment and this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), petitioner has challenged the constitutionality of Sections 508 and 510 of the Rail Passenger Service Act, to be codified at 45 U.S.C. 588 and 590. The Special Court certified that the constitutionality of an Act of Congress had been drawn in question, affording the United States an opportunity to intervene, pursuant to 28 U.S.C. 2403. The

United States participated as amicus curiae in the Special Court, defending the constitutionality of the statute. The United States has a substantial interest in defending the constitutionality of these provisions of the scheme devised by Congress for the transfer of commuter rail services from Conrail to local commuter authorities. The United States also participated as amicus curiae in *United Transportation Union* v. *Long Island R.R.*, No. 80-1925 (Mar. 24, 1982), which controls the question that we address in this case.

STATEMENT

1. On April 1, 1976, 13 commuter rail lines radiating from downtown Philadelphia, previously operated by the Reading and Penn Central railroads or their respective reorganization trustees, were transferred to the Consolidated Rail Corporation ("Conrail"), the federally subsidized railroad corporation established pursuant to Section 301 *et seq.* of the Regional Rail Reorganization Act of 1973, 45 U.S.C. 741 *et seq.* ("3R Act"), to assume operation of bankrupt northeastern railroads. Pursuant to Section 304 of the 3R Act, 45 U.S.C. 744, Conrail continued to operate the transferred commuter lines with the assistance of subsidy payments from petitioner.[1]

On August 13, 1981, Congress relieved Conrail of any obligation to operate commuter service after January 1, 1983. Northeast Rail Service Act of 1981 ("NRSA"), Pub. L. No. 97-35, Section 1136,

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[1] Prior to the Conrail takeover petitioner had subsidized the commuter services operated by the Reading and Penn Central railroads for a period of time. Some of the commuter lines involved extended into New Jersey and Delaware.

95 Stat. 647.[2] Congress provided, however, that "[a] commuter authority may initiate negotiations with Conrail for the transfer of commuter service operated by Conrail," and that such an agreement shall specify the service responsibilities to be transferred, the rail properties to be conveyed, and a transfer date not later than January 1, 1983. Rail Passenger Service Act (RPSA), Section 506(b), as added by NRSA, Section 1137, 95 Stat. 650, to be codified at 45 U.S.C. 586(b). In addition, Congress directed that a local commuter authority that intends to operate commuter services previously operated by Conrail enter into negotiations for an implementing agreement with Conrail and the labor organizations representing employees of Conrail to be transferred. RPSA, Section 508(a), as added by NRSA, Section 1145, 95 Stat. 669, to be codified at 45 U.S.C. 588(a). Such negotiations are to encompass the number and identity of Conrail employees to be transferred to the commuter authority, the procedures for this transfer, and the procedures for determining the seniority of such transferred employees. RPSA, Section 508(c), 95 Stat. 669-670, to be codified at 45 U.S.C. 588(c). If no agreement on these matters is reached by a specified date, they are to be resolved by a referee under prescribed statutory procedures. RPSA, Section 508(d), 95 Stat. 670, to be codified at 45 U.S.C. 588(d). Finally, the statute directs the commuter authority to enter into new collective bargaining agreements governing rates of pay, work rules and working condi-

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[2] NRSA constituted Sections 1131-1169 of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, 643-687.

tions with the various classes or crafts of employees to be transferred and prescribes a mechanism for resolving any disputes that might arise. RPSA, Section 510, 95 Stat. 671-672, to be codified at 45 U.S.C. 590.

2. Petitioner is a corporation organized under the Pennsylvania Urban Mass Transportation Law, Pa. Stat. Ann. tit. 55, § 600.101 *et seq.* (Purdon Cum. Supp. 1981). Petitioner furnishes a variety of passenger services in the Philadelphia area, employing buses, trolleys, subways and elevated railroads, and is one of the "commuter authorities" expressly mentioned in the definition section of NRSA, Section 1135(a)(3), 95 Stat. 646.

On October 5, 1981, petitioner commenced rail passenger service over the Newtown-Fox Chase rail line, which previously had been operated by Conrail. Petitioner's trains on this line were operated by its own employees; none of the Conrail employees who had previously operated the service on this segment was transferred to petitioner's employ. Moreover, petitioner announced its intention to operate rail service over other lines radiating from Philadelphia previously provided by Conrail, and to staff such service with its own employees, rather than enter into negotiations with respect to the transfer of the Conrail employees previously providing the service (Pet. App. A3, A5).[3]

3. Respondent Railway Labor Executives' Association (RLEA) brought this action seeking a declaratory judgment that Sections 508 and 510 of RPSA require petitioner to negotiate agreements with Con-

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[3] Petitioner had acquired the track and rolling stock on these lines in 1976 and 1979 (Pet. App. A3).

rail and the labor organizations representing Conrail employees who serve on the lines petitioner wishes to operate, to govern the transfer of operations.[4] Petitioner claimed in response that the statute leaves it free to eschew negotiations with Conrail and its commuter service employees if it decides to provide service without employing any such employees. Alternatively, petitioner claimed that the statute is unconstitutional, invoking the rule of *National League of Cities* v. *Usery*, 426 U.S. 833 (1976).

4. The Special Court created by the Regional Rail Reorganization Act of 1973 rejected petitioner's contentions. The court first rejected petitioner's argument that Sections 508 and 510 would have come into play only if petitioner had chosen to utilize Conrail employees to provide service on the commuter lines transferred from Conrail to petitioner (Pet. App. A15-A37). The court concluded that the plain language of Section 508 of the NRSA supports RLEA's position; petitioner intends to operate commuter service over lines previously operated by Conrail and therefore is required to enter into negotiations for an implementing agreement (*id.* at A19-A20). The court also observed that the "NRSA was part of the Omnibus Budget Reconciliation Act, the object of which was to save money for the federal government" (*id.* at A18-A19). Because Congress found that termination of Conrail's involvement with commuter operations was essential to achievement of that goal, the court reasoned that Congress was unlikely to have allowed commuter authorities electing to provide their own commuter service to refuse to negotiate

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[4] Respondent Conrail, joined as a party, supported RLEA's contentions.

with respect to the employment of former Conrail employees, thereby undermining Conrail's efforts to reduce costs (*id.* at A17-A19).

The Special Rail Court also rejected petitioner's Tenth Amendment challenge to Sections 508 and 510 of the RPSA. The court noted the Second Circuit's decision in *United Transportation Union* v. *Long Island R.R.*, 634 F.2d 19 (1980), rev'd, No. 80-1925 (Mar. 24, 1982), and suggested that the questions whether operation of petitioner's commuter service is an "integral operation[] in [an] area[] of traditional governmental functions" (*National League of Cities* v. *Usery, supra*, 426 U.S. at 852) and whether Sections 508 and 510 of the RPSA impermissibly displace state decisions are "extremely close" (Pet. App. A37-A40). In light of the pendency of *United Transportation Union* in this Court (Pet. App. A42 & n.24), however, the Special Court found it unnecessary to decide those questions. Instead, relying on *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 288 n.29 (1981), the court concluded that the special federal interest in application of the transfer provisions of the RPSA was, in any event, sufficient to overcome petitioner's countervailing interest (Pet. App. A42). The Court explained (*ibid.*):

> We are not dealing here with an across the board statute like the Fair Labor Standards Act in which the federal government's interest in wages and hours of state and local employees was simply the same interest that it had in regulating all other employees engaged in or producing goods for commerce. The instant controversy arises in the context of an intensive federal effort to preserve both passenger and

freight rail transportation in the northeastern states and passenger service throughout the nation—an effort which has cost billions of dollars of federal funds and from which Pennsylvania has derived great benefits. The Government's interests in minimizing future costs for Conrail and itself and in seeking to preserve labor peace and employee morale clearly transcend Pennsylvania's interest in having [petitioner] free from what is ultimately an arbitral process to determine how its initial employment complement should be set and from bargaining under the Railway Labor Act rather than Pennsylvania's Public Employees Law.

ARGUMENT

The decision of the Special Court on the *National League of Cities* issue is correct and does not conflict with any decision of this Court or of a court of appeals. Moreover, in light of this Court's subsequent decision in *United Transportation Union* v. *Long Island R.R.*, No. 80-1925 (Mar. 24, 1982), further review is plainly unwarranted.

In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), this Court held that the doctrine of intergovernmental immunity generally precluded the application of federal statutes to the states "insofar as [they] operate to directly displace the States' freedom to structure integral operations in areas of *traditional* governmental functions * * *." *Id.* at 852 (emphasis added). Even in such circumstances, however, a Tenth Amendment challenge may not be successful—"[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission." *Hodel* v. *Virginia*

Surface Mining and Reclamation Association, Inc., 452 U.S. 264, 288 n.29 (1981). The result reached by the Special Court correctly reflects these principles. First, as this Court's decision in *United Transportation Union* reaffirms, ownership and operation of a commuter rail line is not a traditional governmental function. Accordingly, general federal legislation affecting commuter lines does not impair a state's ability to function as a state. Second, as the Special Court concluded, the federal interest in revitalizing rail freight and passenger service throughout the nation generally, and in the northeast specifically, is sufficiently strong to require state submission.

In *United Transportation Union* v. *Long Island R.R.*, *supra*, this Court held that operation of the Long Island Rail Road, which provides commuter passenger service substantially similar to that offered by petitioner, "is not an integral part of traditional state activities generally immune from federal regulation under *National League of Cities*." Slip op. 6. The Court explained: "Operation of passenger railroads * * * has traditionally been a function of private industry, not state or local governments." *Id.* at 7 (footnote omitted). The Court concluded (*ibid.*; emphasis in original):

> [T]he historical reality [is] that the operation of railroads is not among the functions *traditionally* performed by state and local governments. Federal regulation of state-owned railroads simply does not impair a State's ability to function as a State.

Moreover, although the Court suggested that the sphere of protected sovereign state functions might

not be entirely static, it remarked that "there is no justification for a rule which would allow the States, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory authority." Slip op. 8. The Court noted that railroads have been subject to comprehensive federal regulation, including regulation of railroad labor relations, for nearly a century. *Id.* at 8-9. This observation applies a fortiori to petitioner's commuter rail lines, because petitioner's commuter lines were previously owned and operated first privately and later by a federally established and subsidized entity.

Furthermore, even if the challenged federal statute were found to impair a state's ability "to structure integral operations in areas of traditional functions," *National League of Cities* v. *Usery, supra,* 426 U.S. at 852, in the present instance "the federal interest advanced [by the statute] * * * justifies state submission." *Hodel* v. *Virginia Surface Mining and Reclamation Association, supra,* 452 U.S. at 288 n.29. The Special Court's opinion, upon which we rely, well demonstrates the United States' strong interest in establishing the terms upon which rail service formerly provided by Conrail, a federally subsidized entity, is to be assumed by other providers of rail service. See pages 6-7, *supra.* As the court below explained (Pet. App. A17-A19), the economic consequences of nullifying Congress' power in this area would be disastrous for Conrail and would seriously impair the comprehensive legislative scheme for reorganizing Conrail and eliminating the need for further federal subsidies.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

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